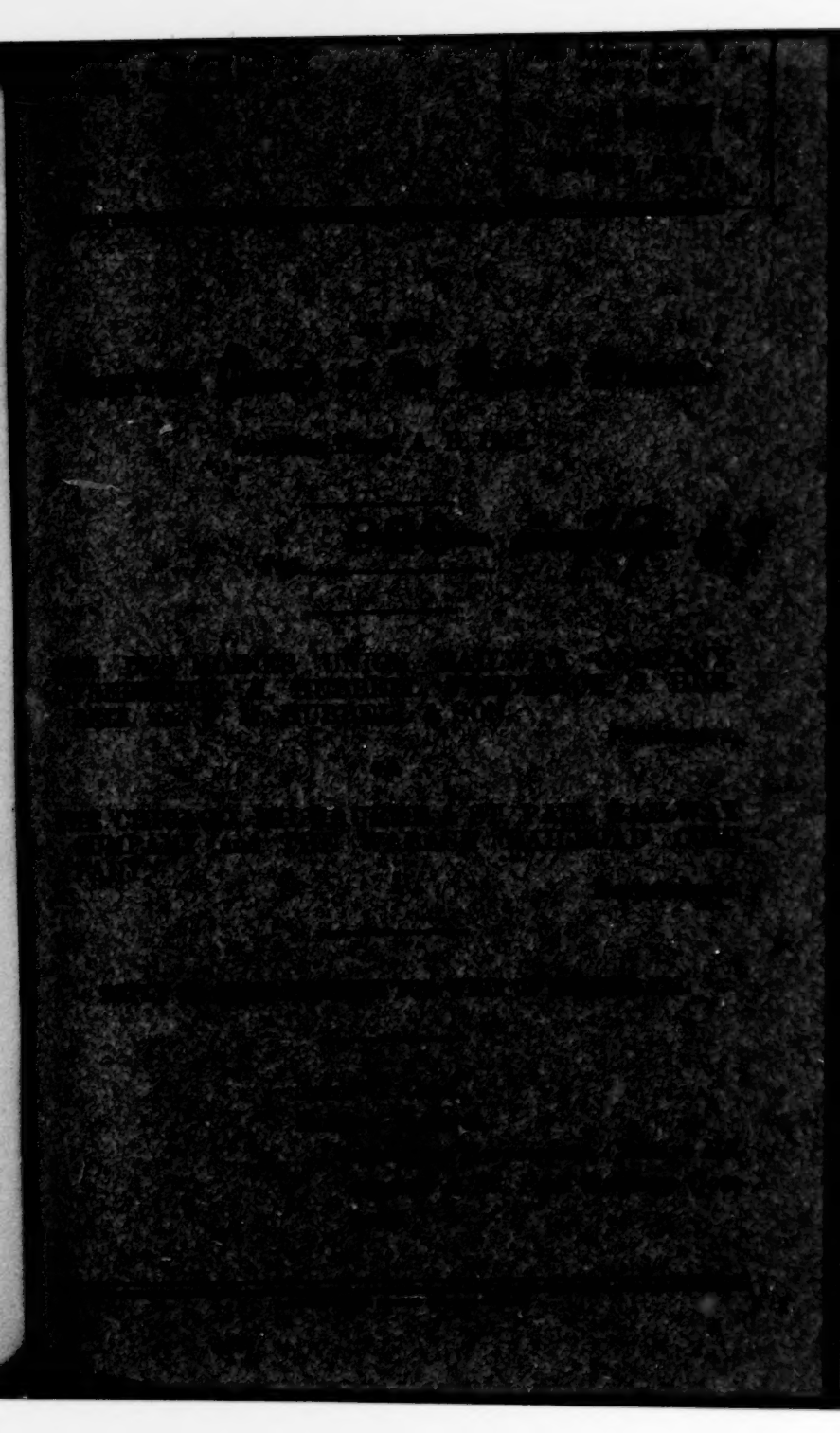

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No._____

THE DES MOINES UNION RAILWAY COMPANY, FREDERICK M. HUBBELL, FREDERICK C. HUBBELL and F. M. HUBBELL & SON,

Petitioners,

vs.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and THE WABASH RAILROAD COMPANY,

Respondents.

REPLY TO CROSS-PETITION FOR WRIT OF CERTIORARI.

The objection to the issuance of a writ of certiorari on the cross-petition herein may be briefly stated as follows: That the question involved is not of sufficient gravity and importance, nor sufficiently open to controversy, to call for the interposition of this court in granting the writ.

Two causes of action are involved in this litigation:

The first cause of action (Rec., 55-106 and 117) involves the right of the St. Paul Company, which owns

and operates more than 10,000 miles of railway, and of the Wabash Company, which owns and operates about 2,500 miles of railway, to continue to occupy and use in connection with their systems of railway, as they have for many years last past, about three miles of main line double track, including a bridge over the Des Moines River, and about 27 miles of side and switch tracks, team and warehouse and industry tracks, and a modern passenger depot and freight houses, all located in the center of business and population in the City of Des Moines, the commercial center of Iowa, having a population of about 125,000. This cause of action is called in the opinions of the court below *The Main Controversy.* (Rec., 2088.) That this cause of action or controversy involves questions of large public interest—and, therefore, questions of gravity and importance, and is sufficiently open to controversy—is clearly shown by the opinion of Judges Stone and Smith and the dissenting opinion of Judge Hook in the court below. (Rec., 2086-2120.)

The second cause of action (Rec., 106-113) relates wholly to the matter of accounting during the life of the operating agreement, which expired May 1, 1918, and involves merely the question of the ownership of certain funds in the treasury of the Des Moines Company. This cause of action in the opinions of the court below is called *Surplus Earnings.* (Res., 2115.) The court below—all judges concurring—held that these funds belong to the St. Paul and Wabash Companies. (Rec., 2115-2119 and 2120.) No public interest is involved in this cause of action, nor is there involved any rule or principle of law which the interest of the public requires this court to determine, and the cross-petition herein makes no such claim. The only reason assigned for the writ is that if the first cause of action, or main controversy, is to be reviewed here, then the second cause of action

should also be reviewed, regardless of the difference in the subject matter and the questions involved. It seems too plain for argument that each cause of action must be dealt with on its own merits, and that as the second cause of action or branch of the suit involves private interests only, and the decision of the court below in respect thereof being unanimous, and no rule of law on which there are conflicting decisions in the different circuits being involved, a writ of certiorari should not be granted for the purpose of reviewing that decision. If the controversy in this litigation had been confined to this single cause of action, and had been decided by the Circuit Court of Appeals as it was decided, there would be no grounds for granting the writ. Aside from this objection, this cause of action, as will be seen by reading the opinions of Judges Stone and Hook, was correctly decided by the court below and the question involved therein—whether the so-called "surplus earnings" belong to the St. Paul and Wabash Companies, as the court below held they do or to the Des Moines Company—is not sufficiently open to controversy to call for a review thereof by this court.

In addition to the facts stated in the opinions of the court below, we call attention to the following: In Section One of the operating agreement (Rec., 480), the Des Moines Company agreed *"to erect and furnish for the use of the parties of the second part (the railways), in said City of Des Moines, a union passenger depot, and such additional switches, sidings, freight depots and roundhouses, shops, water tanks and yard appurtenances."* A considerable portion of the so-called "surplus earnings" arose from the renting of rooms and space in this passenger depot, the use of which belonged to the railways, and on the full cost of which the railways paid interest, taxes, insurance and the cost of repairs and

maintenance. Other portions of such surplus earnings were received from switching that was done with engines acquired at the cost of the railways. Every dollar expended in maintaining and operating these engines and in doing this switching service was borne by the railways and charged to them each month. The receipts from such rentals and switching, when collected, were credited on the monthly bills of the Des Moines Company against the railways *"from the time there were any such earnings."* (Rec., 327.) The first appearance of any such earnings was a small amount in the month of December, 1889. (Rec., 273.) This was nearly a year after the operating agreement had been executed, and nearly two years after the Des Moines Company took charge of the terminal property. These rentals and earnings arising subsequent to the making of the operating agreement, had there been any dispute concerning their ownership or disposition, might well have called into play the provisions relative to arbitration between the parties found in Section 28 of that agreement. (Rec., 487.) But no dispute arose over them, as it was conceded by all concerned that they should go into the monthly accounts between the Des Moines Company and the railways as a credit on operating expenses in favor of the railways. This was in line with the action of the executive and accounting officers of the Des Moines Company (Rec., 272-313), the formal resolution of the board of directors of that company (Rec., 497), and, as the court below decided, was in full accord with the spirit of the operating agreement. It is significant that the resolution of the board of directors of the Des Moines Company was adopted long after the executive and accounting officers had given the railway companies credit for these receipts on their monthly expense bills. (Rec., 497.)

It is respectfully submitted that no grounds exist for granting the cross-petition herein for a writ of certiorari.

JOHN C. COOK,
BURTON HANSON,
Counsel for Respondent, Chicago, Milwaukee & St. Paul Railway Company.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. ~~270~~ 66

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY,

Petitioners,

vs.

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*,

Respondents.

No. ~~270~~ 67

DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL *et al.*

Petitioners,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

JOHN C. COOK,
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LAWRENCE GREER,
ROBERT J. CARY,
F. C. NICODEMUS, JR.,
Counsel for Wabash Railway Company.

SUBJECT INDEX.

LIST OF AUTHORITIES CITED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 278.

Chicago, Milwaukee & St. Paul Railway Company and Wabash Railway Company,

Petitioners,

vs.

Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son,

Respondents.

No. 279.

Des Moines Union Railway Company, Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son,

Petitioners,

vs.

Chicago, Milwaukee & St. Paul Railway Company and Wabash Railway Company,

Respondents.

WRITS OF CERTIORARI TO CIRCUIT COURT OF APPEALS FOR THE EIGHTH JUDICIAL CIRCUIT.

BRIEF AND ARGUMENT OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY AND WABASH RAILWAY COMPANY.

STATEMENT OF THE CASE.

The petitioners, Chicago, Milwaukee & St. Paul Railway Company, called the "St. Paul Company," and

The Wabash Railroad Company, called the "Wabash Company" and also referred to in the brief and argument herein as complainants filed their bill in the District Court of the United States for the Southern District of Iowa, against Des Moines Union Railway Company, called the "Des Moines Company," Frederick M. Hubbell, Frederick C. Hubbell and F. M. Hubbell & Son, called "the Hubbells," and also referred to in the brief and argument herein as the defendants, to establish their right as equitable tenants in common to the joint and exclusive use in perpetuity of the terminal facilities and property in the City of Des Moines, Iowa, held in the name of the Des Moines Company, and for an accounting of large sums of money, called "surplus earnings," collected from time to time by the Des Moines Company and the Hubbells for the use of such terminal facilities and property. (Rec., 53, 119.)

The railroads and terminal facilities in controversy include a double track railroad extending from a connection with the railroad of the Wabash Company at its terminus at the east limits of the City of Des Moines through the business center of the city over a bridge across the Des Moines River to a connection with the tracks of the railroad of the St. Paul Company at its terminus at Sixteenth street near the western limits of the city, a distance of about three miles; modern passenger depot, freight depot, sidetracks, switches, roundhouses, turntables and industry tracks connecting with all industries of importance in Des Moines, together with switch engines and other incidental facilities. (Rec., 183, 480, 1047.) The original outlay for the ground and rights of way was $461,257 and F. M. Hubbell estimated the value of the property at $2,000,000. (Rec., 478; 1094.) The surplus earnings at the time of the filing of the bill amounted to approximately $500,000. (Rec., 109, 194.)

The Hubbells claim that the complete title to and ownership of the terminal property and surplus earnings is in the Des Moines Company, and as holders of 2,500 shares out of the total of 4,000 shares of the capital stock of that company—1,000 shares of the remainder thereof being owned by the St. Paul Company and 500 shares by the Wabash Company—they have asserted the right to exclude the petitioners from the use of such terminal facilities at the expiration of a supplemental operating agreement, namely, on May 1, 1918, and to distribute such surplus earnings among the holders of such capital stock pro rata. (Rec., 329, 333.)

The Bill.

The bill of complaint as amended avers, among other things, that three railway companies—Des Moines & St. Louis Railroad Company, called "St. Louis Company," Des Moines Northwestern Railway Company, called "Northwestern Company," and St. Louis, Des Moines and Northern Railway Company, called "Northern Company"—predecessors in title to the St. Paul Company and the Wabash Company, acquired terminal property in the City of Des Moines and constructed thereon railroad tracks, switches, sidetracks, turnouts, depots and other terminal facilities for their joint use and occupancy; that pursuant to a contract dated January 2, 1882, said Railway Companies created the Des Moines Company and conveyed to it the terminal property so acquired subject to the joint use and occupation thereof in perpetuity, which use and occupation they reserved to themselves, their successors and assigns; that thereafter additional property was from time to time conveyed to the Des Moines Company, subject to such joint use and occupation; that the articles of incorporation of the Des Moines

Company provided, among other things, that all powers exercised by that company should be in accordance with the terms and spirit of the contract of January 2, 1882; that the affairs of that company should be managed by a board of directors to be nominated by the three Railway Companies, their grantees or assigns, and that the Des Moines Company should act as the agent of the three Railway Companies in operating, financing and developing such terminal property and facilities for their use and benefit; that on May 10, 1889, the Des Moines Company and the three Railway Companies entered into an agreement supplemental to the contract of January 2, 1882, defining in detail the relations and duties of the Railway Companies to each other and to the Des Moines Company in the enjoyment of such joint use and occupation of the terminal facilities and property for a period expiring *May 1, 1918;* that the Des Moines Company collected and received from time to time, for the use of such terminal facilities and property by others, income aggregating approximately $500,000, called surplus earnings; that the Hubbells unlawfully obtained control of the Des Moines Company by usurping its offices, and just prior to the commencement of this suit had set up the claim that they owned a large majority of its capital stock, were entitled to elect its directors and officers, and that the Des Moines Company owned such termined facilities and property in its own right, free from such joint use and occupation thereof by the St. Paul Company and Wabash Company, successors in interest of said three Railway Companies, except the rights conferred upon them by such supplemental agreement of May 10, 1889, and that it, said Des Moines Company, was entitled to receive and retain in its own right such surplus earnings so as aforesaid collected from others for the use of such terminal facilities and property.

The bill, besides praying for general relief, prays, among other things, that after May 1, 1918, it be declared that the St. Paul Company and the Wabash Company as successors and assigns of the three Railway Companies, are entitled to the joint and exclusive use in common and in perpetuity of such terminal facilities and property, on the terms stated in the contract of January 2, 1882; that the Hubbells be restrained from interfering with, or obstructing, such use; that the amount of such surplus earnings so collected and received from the use of such terminal facilities and property by others be ascertained and that the Des Moines Company be required to pay the same to the St. Paul Company and the Wabash Company. (Rec., 53, 119.)

The Answer.

The answer to the bill admits in substance the making and execution of the January 2, 1882, contract, the incorporation of that contract in the articles of incorporation of the Des Moines Company, that the various persons who had held title to property under that contract had conveyed the same to the Des Moines Company, but denies that such conveyances were made to that company as trustee, and avers that that company owned said property in its own right.

The answer also admits that the Hubbells have asserted the claim that upon the expiration of the supplemental agreement, May 1, 1918, the right of the St. Paul Company and the Wabash Company to use such terminal facilities and property will cease, and that if they should desire to use such terminal facilities and property thereafter, they could do so only under such contract as might be made therefor.

The answer also admits that the Des Moines Company

had received for the use of such terminal facilities and property by others income aggregating a large sum.

The answer denies that the St. Paul Company and Wabash Company, or either of them, have any right in such terminal facilities and property except such rights as were acquired under the supplemental agreement of May 10, 1889, or that said companies, or either of them, have any interest in, or right to, the surplus earnings so as aforesaid received by the Des Moines Company for the use of said terminal property and facilities by others. (Rec., 174-196.)

SUCCESSION OF ST. PAUL COMPANY AND WABASH COMPANY.

Wabash *Railway* Company, herein called the "Wabash Company," on July 1, 1916, succeeded to the title of the railway, property and franchises theretofore belonging to The Wabash *Railroad* Company, the original complainant in this bill, and was by order duly entered herein substituted in place of The Wabash *Railroad* Company as party complainant in this bill. (Rec., 2053.) The Wabash *Railroad* Company succeeded to the title of the railway, property and franchises of the Wabash Western *Railroad* Company, which latter company succeeded to the title of the railway, property and franchises of the St. Louis Company and of the Wabash, St. Louis & Pacific Railway Company. (Rec., 530-534.)

The St. Paul Company is the remote successor of the Northwestern Company and the Northern Company, the two companies last named having in 1891 consolidated under the laws of Iowa under the name of Des Moines Northern & Western *Railway* Company. (Rec., 694.) Thereafter, by foreclosure and sale, the railway, property and franchises of the last named company were acquired by the Des Moines Northern & Western *Railroad*

Company, and this last named company in February, 1899, conveyed all its railway, property, franchises, rights and interests to the St. Paul Company. (Rec., 673.)

The St. Paul Company having succeeded to all the property, rights, interests and privileges of the Northwestern Company and the Northern Company, and the Wabash Company having succeeded to all the property, rights, interests and privileges of the St. Louis Company, they likewise succeeded to all the property, rights, interests and privileges of the parties to the January 2, 1882 contract and to all the property, rights, interests and privileges of the St. Louis Company, the Northwestern Company and the Northern Company in the supplemental agreement of May 10, 1889. Ever since such succession by the St. Paul Company and Wabash Company, they have used the terminal properties in Des Moines under said contract of January 2, 1882, and said supplemental agreement of May 10, 1889, and such succession and use of the terminal properties in Des Moines have been recognized by the Des Moines Company and the Hubbells. Neither of said railway companies nor any of their predecessors ever had or now has access or entrance to the City of Des Moines except over the terminal properties in controversy.

Decree of the District Court.

The decree of the District Court adjudged

(a) That the Des Moines Company was organized for the purpose of furnishing terminal services to the St. Paul Company and the Wabash Company and their predecessor Railway Companies, and acquired the terminal property and facilities for that purpose; that such corporate obligation still exists in their favor and is absolute and paramount to any obligation of the Des Moines Company to serve other railway companies, and that after May 1. 1918—the

termination of the supplemental agreement of May 10, 1889—if the parties in interest are unable to agree upon the terms under which the St. Paul Company and the Wabash Company might continue to use such terminal property and facilities, the court, upon application, would fix the same.

(b) That the Des Moines Company is the absolute owner of the so-called surplus earnings, and that the St. Paul Company and the Wabash Company have no interest therein except such as accrued to them as stockholders of the Des Moines Company. (Rec., 2065.)

The St. Paul Company and the Wabash Company appealed from the entire decree to the United States Circuit Court of Appeals for the Eighth Circuit. (Rec., 2068.) The Des Moines Company and the Hubbells appealed from that part of the decree set out in paragraph "(a)" above. (Rec., 2077.)

DECREE OF THE UNITED STATES CIRCUIT COURT OF APPEALS

The decree of the Court of Appeals adjudged

(a) That the decree of the District Court should be modified so as to state that the complete title of the terminal property and facilities was in the Des Moines Company; that the only interest of the St. Paul Company and the Wabash Company in such property and facilities, or in the management of the Des Moines Company, is such as flows from their ownership of stock of the Des Moines Company. (Rec., 2127.) *Hook, Circuit Judge, dissented as to this portion of the decree.* (Rec., 2021.)

(b) That the so-called surplus earnings belong to the St. Paul Company and the Wabash Company, and that a master should be appointed under instructions to ascertain the part due to each company upon a wheelage basis. (Rec., 2127.) *Hook, Circuit Judge, concurred in this portion of the decree.* (Rec., 2021.)

Writs of Certiorari.

The St. Paul Company and the Wabash Company petitioned this Court for a writ of *certiorari* to review the record in respect of that part of the decree of the United States Circuit Court of Appeals which adjudged that the complete title to the property and terminal facilities is in the Des Moines Company, and that the only interest of the St. Paul Company and the Wabash Company in such property and facilities or in the management of the Des Moines Company is such as flows from their stock ownership in the Des Moines Company. The Des Moines Company and the Hubbells petitioned this Court for a writ of *certiorari* to review the record in respect of that part of the decree of the United States Circuit Court of Appeals which adjudged that the so-called surplus earnings belong to the St. Paul Company and the Wabash Company. Both petitions were granted by this Court, and this case is here in response to these writs of *certiorari*. As the so-called surplus earnings branch of this case involves no public interest and no rule or principle of law which public interest requires this Court to determine, and as the decision of the Court of Appeals thereon was unanimous, presumably this branch of the case is here because the other branch, or the main controversy in the case, was brought here. Indeed, this was the ground of the Hubbells' petition.

Questions Involved.

The underlying questions are:

(a) Whether the Des Moines Company holds the title to the terminal property in trust for the St. Paul and Wabash Companies as equitable tenants in common therein and subject to their joint use and occupation upon the

terms described in the contract of January 2, 1882, with the result that following the expiration of the Supplemental Agreement on May 1, 1918, the St. Paul and Wabash Companies were, and are, remitted to the rights and obligations of that contract, as held by Judge Hook in his dissenting opinion, or whether the title to the terminal property is absolute and complete in the Des Moines Company, and the St. Paul and Wabash Companies' only interest therein is such as flows from stock ownership, as held by the majority opinion; and

(b) Whether the St. Paul and Wabash Companies are entitled to the so-called Surplus Earnings, as adjudged by the Circuit Court of Appeals—all the judges concurring.

The questions in paragraph (a) are raised by the following specification of error:

SPECIFICATION OF ERROR RELIED UPON.

The court below—Circuit Court of Appeals—erred in holding that the Railway Companies have parted with the exclusive ownership and control of the terminal property which they had reserved to themselves under the January 2, 1882 contract, and that the complete title to this property is in the Des Moines Company, and that the only interest of the St. Paul Company and the Wabash Company in such property, or in the control and management thereof or of the Des Moines Company, is such as flows from stock ownership. (Rec., 2114, 2118.)

STATEMENT OF FACTS.

It is not questioned by any of the parties in interest to this proceeding that the transactions and events out of which has grown the present controversy began with the existence of a trust under which the predecessor Railway Companies of the complainants were the beneficial owners in the property held by the Des Moines Company.

The majority opinion of the Circuit Court of Appeals assumes as the premise upon which its conclusions are founded the existence of this trust, and the result reached by it is based upon the theory that through inadvertent developments this trust has disappeared. (Rec., 2096, 2102.) This factor of inadvertence in the alleged dissolution of the trust is stated by that Court in the following language:

> "There is nowhere any indication that the railways intended any such result and yet such in our judgment is the result. This unexpected outcome was the product of several circumstances." (Rec., 2113.)

The dissenting judge in the Court of Appeals states that

> "The excerpt quoted above touches the quick of this controversy." (Rec., 2119.)

And in commenting upon it, he says that the conclusions of the majority are of this significance:

> "In other words the proprietary companies were not cognizant of the trend of the circumstances and the result held to follow though unexpected and not intended by them, is enforced because of legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circum-

> stances relied on do not appear to me to have the significance attributed to them, but were it otherwise, the presumption should not be so broadly applied to the case of a trust, the destruction of which is claimed by those subject to the disabilities of trustees dealing for themselves." (Rec., 2119.)

The several tests of the rights of the parties must all eventually come to the issue disclosed by the above quotations from the majority and minority opinions of the Circuit Court of Appeals.

In such a situation it is believed that the facts of the case can be presented most significantly by classifying them in the following three groups:

I. A statement of those facts which were preliminary to the establishment of the trust and were the inducement for the same.

II. A statement of the terms of the trust and of its development in the corporate form which it eventually took, and in this respect the relation of the defendants Hubbell as the administrators and fiduciaries of the trust.

III. The independent transactions of the Hubbells in respect of the trust property and the several aliquot interests evidenced and measured by shares of stock of the corporate trustee.

I.

A STATEMENT OF THOSE FACTS WHICH WERE PRELIMINARY TO THE ESTABLISHMENT OF THE TRUST AND WERE THE INDUCEMENT FOR THE SAME.

The defendant F. M. Hubbell.

In 1880 the defendant F. M. Hubbell and Jefferson S. Polk were copartners, practicing law, trading in real estate and promoting railroad enterprises in and about the City of Des Moines, Iowa, under the firm name of

Polk and Hubbell. (Rec., 998.) The defendant Hubbell was president of and he and his partner Polk and two associates, J. S. Clarkson and J. S. Runnells, were the stockholders of the Narrow Gauge Railway Construction Company, a contracting company which had constructed certain railroad mileage in the vicinity of Des Moines. (Rec., 407, 408; 998.)

The railroad situation at Des Moines in 1880.

At this period the Wabash, St. Louis and Pacific Railway Company, referred to in the pleadings as the original Wabash Company, owned and operated a system of railways lying east and west of the Mississippi River, including a line extending from St. Louis to Albia, a point in the State of Iowa about 67 miles southeast of the City of Des Moines. (Rec., 998.) Polk and Hubbell being interested in a narrow gauge railroad partly constructed to the northwest of Des Moines from Waukee to Adel, a distance of about 7 miles, sought to interest the Wabash Company in the construction of new railroad mileage in and about the City of Des Moines, including the completion and development of the partially constructed road, of which they were the owners. (Rec., 998, 1001.)

The projected railroad construction in which Polk and Hubbell sought to interest the Wabash Company, may be roughly indicated by the letter Y. The stem of the Y represents a proposed extension of the road of the Wabash Company from Albia to Des Moines; the left arm of the Y a line extending northwesterly from Des Moines to Fonda, of which 7 miles of railroad between Waukee and Adel had already been constructed under the charter of a corporation controlled by Polk and Hubbell and known as the Des Moines Northwestern Railway

Company, hereafter referred to as the "Northwestern Company." The right arm of the Y represents a further projected line to extend in a general northerly direction from Des Moines to the Town of Boone.

A blue print of these roads as subsequently constructed appears in the record at page 197.

As the three projected roads converged at Des Moines, it was also proposed that proper terminals and terminal facilities in Des Moines be acquired for their joint and common use. (Rec., 412, 1001.)

The contracts with the defendant Hubbell and his associated interests.

On December 8, 1880, the defendant F. M. Hubbell, his partner Jefferson S. Polk and J. S. Clarkson and J. S. Runnells, being the same parties who owned and controlled the capital stock of the Narrow Gauge Railway Construction Company, entered into a contract with the Wabash Company providing for the construction of a line in extension of the line of that company along the stem of the Y from Albia to Des Moines, this line to be constructed at the cost of the Wabash Company in the name of the St. Louis Company, a corporation which the defendant Hubbell and his associates contracted to organize. This contract provided in substance that the defendant Hubbell and his associates would incorporate the St. Louis Company with a capital stock of two million dollars and authorized to construct a railroad from Des Moines, Iowa, to Albia in said state. They were to give their time, personal attention to and act as directors and officers of this enterprise, so far as necessary to locate and economically construct the railroad, but subject to the approval of the Wabash Company. They were personally to exert

themselves to procure subsidies in aid of the line and donations of lands, stations, right of way and other benefits in aid of its construction. They were to receive as compensation for their services, in all of the above respects from the time of the execution of the contract made by them to the completion of the railroad, the sum of $10,000 in money and a further sum of five per cent of the amount of all subsidies which should be actually paid, and five per cent of the value of donations in lands for right of way or station purposes and five per cent of the value of all other aid to the construction of the railroad accepted by the Wabash Company. (Rec., 396.)

The contract also provided that the defendant Hubbell and his three associates should each subscribe for one share of the stock, and that the balance of the stock should be subscribed for by a nominee of the Wabash Company, who should undertake to make payment of his subscription by constructing the proposed railroad. (Rec., 398.) James F. How became the nominee of the Wabash Company, and so subscribed for the balance of the stock, and the road was constructed by the Wabash Company in his name as contractor. (Rec., 999.)

On the same date with that of the above contract, namely, December 8, 1880, the line hereinbefore mentioned as controlled by Hubbell and his associates, namely, the Northwestern Company and a corporation named the Narrow Gauge Railway Construction Company, also owned and controlled by the same parties, entered into a contract with the Wabash Company, providing for the completion of the line of the Northwestern Company along the left arm of the Y from Des Moines to Fonda. This contract provided that the line should be constructed by the Construction Company in consideration of $7,000 per mile of bonds of the Wabash

Company, to be secured in part by a mortgage given by the Northwestern Company upon the proposed road, the stock of the Northwestern Company to be equally divided between the Construction Company representing Hubbell and his associates, and the Wabash Company. (Rec., 400.)

The contract also provided that, in order to supply the Construction Company with funds, the Wabash Company would purchase the mortgage bonds deliverable to the Construction Company on the basis of 95 per cent of their par value. (Rec., 406.) This formality was not followed, but the Wabash Company, instead of actually delivering the bonds to the Construction Company, provided it with funds direct by selling the bonds in the market. (Rec., 1001.)

No contract covering the construction of the line northwardly from Des Moines to Boone, along the right arm of the Y, appears in the record, the financing of this road having been undertaken by Gen. Grenville M. Dodge, as an independent enterprise. However, the actual construction work was performed by the Narrow Gauge Construction Company, which company operated from the office of Polk and Hubbell in the City of Des Moines. (Rec., 1170, 1180.)

The corporate organization of the three railway companies mentioned above.

On December 15, 1880, Polk, Clarkson, Runnells and Hubbell, in pursuance of the contract first mentioned above, incorporated the St. Louis Company under the laws of Iowa, for the purpose of constructing the proposed line along the stem of the Y from Albia to Des Moines. (Rec., 408.) Hubbell was made secretary of

the company and also a director, and held both positions until 1891. (Rec., 1297.)

On December 23, 1880, the same four individuals, pursuant to the contract last above mentioned, reincorporated said Northwestern Company for the purpose of completing the line along the left arm of the Y from Des Moines to Fonda (Rec., 725.) Hubbell was made treasurer of the company and also a director of the same, and served continuously in both capacities until the reorganization of said company in 1886, except in 1880, when he served as its assistant treasurer. (Rec., 1279.)

On April 4, 1881, the same four individuals, pursuant to an arrangement with said Dodge, incorporated the St. Louis, Des Moines and Northern Railway Company, hereinafter referred to as the "Northern Company," for the purpose of constructing the third line along the right arm of the Y from Des Moines to Boone. (Rec., 728.) Hubbell was made a director of the company and served in this capacity until 1890; he also served as treasurer of the company until 1883. (Rec., 1297.)

The construction work.

The actual construction work of the three lines, as well as the assembling the necessary terminal railways and facilities at Des Moines, proceeded actively during the year 1881.

The work on the line of the St. Louis Company was under the direction of James F. How, the subcontractor above referred to, designated by and representing the Wabash Company. (Rec., 419, 1001.)

The work on the lines of the Northwestern Company and of the Northern Company was under the direction of the Narrow Gauge Construction Company, and the

operations were conducted from the office of Polk and Hubbell. (Rec., 1170.)

The assembling of the terminal railways and facilities in Des Moines was also conducted from the office of Polk and Hubbell and was under the personal direction of Hubbell himself. (Rec., 981, 1181.) Hubbell also negotiated the purchase of all the real estate, and where condemnation proceedings were necessary these were conducted by Parsons and Runnells, attorneys for the Wabash Company at Des Moines. (Rec., 1001, 1002.)

The funds for the purchase and acquisition of real estate and other property were advanced by the Wabash Company and Gen. Grenville M. Dodge.

Such of the real estate acquired as was charged to the St. Louis Company, or to the Northwestern Company, was paid for by the Wabash Company and title to the same was taken in the name of James F. How individually or of James F. How, trustee, or was taken in the name of other individuals in the first instance and subsequently transferred to How in one of the above capacities.

Such of the real estate as was charged to the Northern Company was paid for by Dodge and the titles were taken in his name.

Certain property being largely property acquired as the result of condemnation proceedings, was taken in the names of either the St. Louis Company or the Northern Company. (Rec., 1045, 1181.)

At the close of the year 1881, the road of the Northwestern Company was opened for operation, and its trains were running into the Des Moines terminals, and the two other roads were well advanced. (Rec., 1053.) But no formal contract had yet been made for the per-

manent ownership and operation of the terminals, that is to say, the terminal development was still proceeding under the parol understanding dating back to the inception of the enterprise.

Thus, at this point, the following situation had developed:

The legal title to certain of the properties was in the Northern Company, which it had acquired by condemnation proceedings; the legal title to certain other property was in the St. Louis Company, which it had also acquired by condemnation proceedings; the remaining property was in the title of certain individuals, namely, Dodge and How, without specification of the terms of the trust, but the beneficiaries of the trust were the three railway companies, by or on whose behalf all of the above referred to properties had been acquired and which had provided the money for the acquisition thereof.

It therefore appears that operation had already begun on the terminal properties before any permanent plan for the proper holding of such properties for railroad purposes had been determined upon by the beneficiaries of the trust enterprise.

II.

A STATEMENT OF THE TERMS OF THE TRUST AND OF ITS DEVELOPMENT IN THE CORPORATE FORM WHICH IT EVENTUALLY TOOK, AND IN THIS RESPECT THE RELATION OF THE DEFENDANTS HUBBELL AS THE ADMINISTRATORS AND FIDUCIARIES OF THE TRUST.

As a result of the situation summarized at the conclusion of the foregoing subdivision, the parties to the enterprise entered into a certain contract which created the express trust lying at the foundation of this suit.

The contract of January 2, 1882 (Rec., 411).

This contract was made between the St. Louis Company, the Northwestern Company and the Northern Company as the beneficial owners of the terminal properties and G. M. Dodge, James F. How and James F. How, trustee, as the holders in trust of the legal titles to certain of the terminal properties. The Wabash Company also subjoined its consent to the execution of the agreement by the St. Louis and Northwestern Companies.

This contract states:

(1) That the three companies—St. Louis Company, Northwestern Company and Northern Company—are engaged in the construction of railways converging at Des Moines, and had theretofore agreed upon the purchase, construction and maintenance of terminal facilities at Des Moines, at their joint expense, *and that such terminal facilities should be held and used in common as provided in said contract.* (Rec., 412.)

(2) That in pursuance of the agreement theretofore made various purchases had been made of property in Des Moines in the name of the St. Louis Company, James F. How individually and as trustee, and Grenville M. Dodge, and the construction of buildings and other improvements upon the property so purchased had been commenced. (Rec., 412.)

(3) That the expense incurred by such purchases and improvements, and such others as might thereafter be made, should be borne one-half by the St. Louis Company, one-quarter by the Northwestern Company, and one-quarter by the Northern Company. (Rec., 412.)

(4) That it was understood that a "*Depot Company*" might be organized to take permanent charge of the

terminal property upon the terms set forth in the contract, and that said *"Depot Company"* might issue and deliver to the three railway companies its mortgage bonds to the amount of their respective portions of the cost of said purchases and improvements. (Rec., 412.)

(5) That the title to said terminal property should *be* and *remain* in a trustee to be named by the three railway companies *"but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described."* (Rec., 412.)

(6) That How and Dodge declare that their purchases of property were "made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said TRUSTEE *upon demand and reimbursement."* (Rec., 413.)

(7) That the St. Louis Company shall be charged with the police control, supervision and maintenance of the terminal property, and the expense thereof to be apportioned between it and the Northwestern and Northern Companies upon a wheelage basis. (Rec., 413.)

(8) That spur tracks shall be built connecting the terminal property or grounds with factories and other sources of trade in Des Moines, which tracks shall be adapted for use for both broad and narrow-gauge tracks. (Rec., 413.)

(9) That in the event that any company whose railroad does not extend to Des Moines shall effect an arrangement for running its trains into Des Moines over the railroad of the St. Louis Company, the Northwestern Company or the Northern Company, such company shall be entitled to the use of all of the terminal facilities upon the payment of a fair sum for rental and its proportion of maintenance, and that railroad companies

whose roads extend to Des Moines may be admitted to the use of such terminal facilities by agreement of all said companies. (Rec., 413-414.)

(10) That the grounds or terminal property to be held in common by the St. Louis Company, Northwestern Company and Northern Company under such contract are all east of Farnum street in the City of Des Moines. (Rec., 414.)

Speaking of this contract, Judge Stone, who wrote the majority opinion in the Court of Appeals, says:

(a) "An analysis of this contract shows a statement of the occasion and object of the contract, provisions for the title, the use and occupation, the maintenance and improvement of the property." (Rec., 2091.)

(b) "As to the companies (Railways), the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. *The title contemplated was a trust.* The legal title to be 'in a trustee to be named by agreement of said companies.' The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor. While this proportional interest is not set forth in so many words, it is necessarily inferred from the combined circumstances that the companies were to pay therefor and for improvements thereto in proportion of one-half, one-fourth and one-fourth." (Rec., 2096.)

(c) *"The contract terms and intent as to ownership were a trust."* (Rec., 2102.)

In connection with the foregoing, particular attention is directed to the third article of the agreement, providing that a "Depot Company" *might be organized to take charge of the terminals, the same to be transferred to the Depot Company in such form of title as would permit it to mortgage the property as security for its bonds,* and also to the second and fourth articles of the agree-

ment providing that the title to the terminal properties *shall be* and *remain* in a trustee to be designated by the parties, *but subject to the use and occupation of the terminals by the three beneficiary railway companies.*

Following the execution of this contract, the parties in interest continued the work of completeing the three railway lines, the making of improvements of the terminal property at Des Moines by the construction of necessary buildings and facilities, the purchase of additional property, obtaining franchises, and connecting the tracks of the St. Louis Company, which were broad gauge, with the tracks of the Northwestern and Northern Companies, which were narrow gauge, by laying a third rail alongside of the rails of each of the three companies through the terminal property.

It is to be further noted that the enterprise was subsidized by aid voted by various counties through which the lines of the St. Louis, the Northern and the Northwestern Companies extended, and that it received further valuable subsidies in the form of donations of rights of way, among these being a right of way granted by ordinance of the City of Des Moines covering the main line of the terminal railway in the City of Des Moines. (Rec., 443, 788-816, 1049.)

The completion of the railroads.

During the years 1882 and 1883, the construction of the two remaining roads was completed. The line of the Northern Company was put into operation in August, 1882, and on January 4, 1883, stockholders of the St. Louis Company adopted a resolution formally accepting its road as completed between Albia and Des Moines. (Rec., 882, 1427.)

The incorporation of the Des Moines Union Railway Company.

On December 9, 1884, the board of directors of the Northwestern Company adopted a resolution reciting that, it having been agreed by the parties to the contract of January 2, 1882 that the property and franchises theretofore acquired, should be used for terminal facilities at Des Moines, it was desirable that a corporation be organized for the purpose of taking and holding such property and *"carrying out the objects of said contract of January 2, 1882," and that F. M. Hubbell and others act for this company in the organization of such corporation.* (Rec., 415.)

Accordingly on December 10, 1884, representatives of the Northwestern Company, of the St. Louis Company and of the Northern Company met in the City of Des Moines for the purpose of organizing the Depot Company, which the parties had agreed "might be organized to take permanent charge of the terminal property upon the terms set forth in the contract."

Present at the meeting were:

G. M. Dodge, representing himself and the Northern Company.

J. S. Polk and F. M. Hubbell, representing the Northwestern Company.

John S. Runnells and C. F. Meek, representing the St. Louis Company, and

James F. How, both as trustee and in his individual capacity.

The first action of this meeting was the adoption of the following resolution:

"Resolved, That for the purpose of carrying out

the objects and purposes of the agreement heretofore, to wit, on the second day of January, 1882, made and entered into by and between the Des Moines & St. Louis Railroad Company and others (which is set out in full in the following Articles of Incorporation), the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company, to wit:" (Rec., 416.)

Following this resolution, articles of incorporation of the Des Moines Company were adopted which were preceded by the following:

"WHEREAS, The Des Moines & St. Louis, the Des Moines Northwestern and the St. Louis, Des Moines & Northern Railway Companies have been engaged in the construction of railways converging at Des Moines, Ia., and have secured certain franchises, purchased certain realty and made certain improvements thereon—which they have heretofore agreed should be secured, purchased, made and maintained upon certain agreed conditions, at their joint expense—in accordance with a contract made and entered into by and between said companies and Grenville M. Dodge and James F. How, trustee, bearing date January 2nd, A. D. 1882, and which contract is in words and figures as follows, to wit:

(Here follows the contract of January 2, 1882, *verbatim et literatim*.)

"WHEREAS, each of said railway companies and said parties has expended large sums of money in purchasing and improving the property aforesaid, and in the construction of suitable buildings for the use of said companies, and

WHEREAS, it was provided in the contract aforesaid that a depot company might be organized to take permanent charge of the property, and it was the understanding of the parties that such company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties hereto.

Now, THEREFORE, for the purposes aforesaid, as well as for those hereinafter expressed, the under-

signed hereby associate themselves in a body corporate, and adopt the following:

Articles of Incorporation." (Rec., 416-419.)

These articles, besides stating the name of the corporation, its principal place of business, the names of the officers and the first board of directors, the manner of calling meetings of the board of directors, the method by which the articles might be amended, and the term of the corporation, provided:

(1) That the nature of the business to be transacted by the *"Depot Company"* shall be the construction, ownership and operation of a railway in, around and about the City of Des Moines, including the construction, ownership and use of depots, freight houses, railway shops, and whatever else may be useful and convenient for the operation of the railways at the terminal point in Des Moines, as well as the transfer of cars from one railway to another, or from factories, warehouses and elevators to each other or to any of the railways in or around Des Moines; the *"Depot Company"* to possess all the powers conferred upon corporations for pecuniary profit under Chapter 1 of Title IX of the Iowa Code and the amendments thereto. (Rec., 420.)

(2) *That all the powers exercised by the "Depot Company" shall be in accordance with the terms and spirit of the January* 2, 1882, *contract.* (Rec., 420.)

(3) That the *"Depot Company"* shall have the right to lease or otherwise dispose of the use of any part of its franchises to any other railway company, provided the assent in writing of the St. Louis Company, the Northwestern Company and the Northern Company shall be necessary before such lease or disposition can be made to any other than the three companies last named. (Rec., 420.)

(4) That the affairs of the *"Depot Company"* shall be managed by a board of eight directors, four of whom shall be nominated by the Wabash, St. Louis & Pacific Railway Company, two of whom by the Northwestern Company, and two by the Northern Company. This provision applies to any grantee or assignee of either of these companies. (Rec., 421.)

(5) That no contract, lease or other agreement amounting to a permanent charge on the property of the *"Depot Company"* shall be entered into unless the same shall have been first approved by the St. Louis Company, the Northwestern Company and the Northern Company, or their assignees, and shall have been submitted to a meeting of the stockholders and approved by more than three-fourths of all the stockholders, and that no limitation whatsoever upon any of the franchises of the *"Depot Company"* shall be made by its board of directors except the same shall have been submitted to and approved by the stockholders. (Rec., 421.)

(6) That the capital stock of the *"Depot Company"* shall be $1,000,000, divided into shares of $100 each, to be paid at such times and in such manner as the board of directors may determine, and the board is authorized to receive in payment of such stock the property and franchises in Des Moines now held by the St. Louis Company, the Northwestern Company, the Northern Company, How and Dodge individually and How as trustee. (Rec., 420.)

The articles bear the signature of F. M. Hubbell, J. S. Polk and J. S. Runnels. (Rec., 422.)

F. M. Hubbell acted as secretary of the meeting which adopted these articles. (Rec., 423.)

Particular note should be given to that provision of

the articles of incorporation above quoted, which reads that:

> "All the powers exercised by this company (The Depot Company), shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." (Rec., 420.)

Particular attention is also called to the article giving a veto power in the management of the affairs of the *"Depot Company"* to each of the beneficiaries of the trust in the following terms:

> "No contract, lease or other agreement amounting to a permanent charge upon the property of the corporation, shall be entered into by the board, unless the same shall have been first approved by the Des Moines and St. Louis Railroad Company, the Des Moines, Northwestern Railway Company and the St. Louis, Des Moines and Northern Railway Company, or their assignees * * *." (Rec., 421.)

The resolutions of January 1, 1885.

Following the incorporation of the Des Moines Company, the stockholders of the St. Louis Company, the Northwestern Company and the Northern Company, at meetings held January 1, 1885, adopted resolutions reciting the execution of the January 2, 1882, contract, and the incorporation of the Des Moines Company December 10, 1884, and declaring:

(a) That each company accepted and ratified, so far as its interests were affected thereby, the articles of incorporation of the Des Moines Company *as in substantial accord and compliance with the terms and conditions of the January* 2, 1882, *contract,* and undertook to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of the Des Moines Company. (Rec., 424.)

(b) That the proper officers of each company be authorized, upon the issuance to it of the share of bonds and stock of the Des Moines Company to which it might be entitled under the contract, to convey, assign and transfer to the Des Moines Company all its right, title, and interest, of whatever name and nature, in and to the real estate, franchises, choses in action and right in possession or contingent, to all the property in the City of Des Moines east of Farnum street *then held, enjoyed or claimed by either or all the signatories of said January* 2, 1882, *contract, or any agent or trustee thereof, purchased, acquired or held in pursuance of that contract.* (Rec., 424.)

F. M. Hubbell presented the resolution adopted by the stockholders of the St. Louis Company and the Northwestern Company, and voted for their adoption. (Rec., 423, 426.)

On the same day, January 1, 1885, the first meeting of the board of directors of the Des Moines Company after its incorporation, was held. At this meeting, resolutions were adopted the preambles to which stated that the St. Louis Company, the Northwestern Company, the Northern Company, How both in his individual right and as trustee, and Dodge, had by their officers and by themselves personally notified the Des Moines Company that they had each approved of the organization of the Des Moines Company and had directed their officers and trustees to surrender and deliver to the Des Moines Company the railroad property and franchises mentioned in the contract of January 2, 1882, *and had requested the Des Moines Company to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in the January* 2, 1882 *contract,* and that said railway companies and individual signa-

tories to that contract had indicated their desire and purpose to transfer the property to the Des Moines Company in accordance with the terms of that contract, and that it was desirable that the Des Moines Company at once should take possession of such property and maintain, control and operate it and procure all necessary conveyances and transfers of the same and make provisions for, and pay for said property so proposed to be conveyed to it. The resolutions declared:

(a) That the Des Moines Company accepted the transfer and management and operation of such property theretofore owned by the St. Louis Company, the Northwestern Company, the Northern Company and others, parties to the January 2, 1882 contract, and assumed control thereof, and instructed its president to make such order as might be necessary to render *such control and management effective as provided in that contract.* (Rec., 433.)

(b) That the officers of the Des Moines Company be appointed a committee to confer with the parties to the January 2, 1882 contract, and agree with them severally upon the terms and price at which they would, respectively, assign, transfer and convey such property and franchises to the Des Moines Company, *and to procure from them, and each of them, such conveyances and transfers as might be necessary to fully invest the Des Moines Company "with the* TITLE, *control and management of said properties provided for in said contract of January 2nd,* 1882." (Rec., 433.)

(c) That to enable the Des Moines Company to pay for the property and to maintain, operate and improve the same, and purchase other property necessary to carry out its objects, the president and secretary of the company were authorized and directed to issue fully

paid capital stock not to exceed $1,000,000, and bonds not to exceed $500,000, and to secure said bonds were authorized and directed to execute in the name of the Des Moines Company a first mortgage or deed of trust covering all the property of the Des Moines Company, and that when the committee had agreed with the parties to the January 2, 1882 contract as to the amount of bonds and stock of the Des Moines Company necessary to be delivered to them, the president and secretary of the Des Moines Company should deliver said stock and bonds to the several parties on receipt of the conveyances and assignments of the property to be made to the Des Moines Company. (Rec., 434.)

Frederick M. Hubbell as a member of the board of the Des Moines Company voted in favor of these resolutions, and as secretary of that company acted as secretary of the meeting. (Rec., 435.)

In considering the significance of the foregoing resolutions it should be noted that the authority and direction given by them to the officers of the Des Moines Company to issue its bonds and stock is to be identified with the terms of the trust declared by the January 2, 1882, contract.

Respecting the issue of bonds authorized by the resolutions, the trust contemplated that the expenses incurred by the purchases and improvements representing the trust property should be borne by the beneficiaries in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies and that, through a Depot Company, such beneficiaries might reimburse themselves for this expense by the acceptance of mortgage bonds to be issued to them by such Depot Company to the amount of their respective portions of the cost of said purchases and improvements.

Respecting the issue of stock, the trust authorized the Depot Company to take charge of the property upon the terms of the January 2, 1882 contract and the resolutions in harmony with this idea appointed a committee to confer with the parties to such contract for the purpose of procuring from them such conveyances and transfers as would be necessary to fully invest the Depot Company "with *the title, control and management of said properties provided for in said contract of January* 2, 1882"; thus, the stock to be issued by such Depot Company became an indicia of ownership of the several proprietors in the trust title to be conveyed to the Depot Company as contemplated by the resolutions.

Supplementary resolutions of November 5 *and* 8, 1887, *of the Des Moines Company and the proprietary companies, providing for the transfer of titles of the trust properties held by the individual trustees to the Des Moines Company.*

It is to be noted that more than two years intervened between the passage of the resolutions of January 1, 1885, and the date of the above resolutions. This delay, in providing for the transfer of the trust property, arose by reason of the following circumstances:

On May 29, 1884, receivers were appointed of the railroads and property of the Wabash, St. Louis and Pacific Railway Company. (Rec., 229.)

On July 15, 1885, James F. Joy, O. D. Ashley, Thomas H. Hubbard and Edgar T. Wells, representing the holders of the defaulted bonds of the Wabash Company, associated themselves together as a purchasing committee for the purpose of acquiring at foreclosure sale the properties of the company. (Rec., 540, 1864.)

As already stated, the Wabash Company had advanced

to the Northwestern Company the funds necessary to enable it to build the extension of its line from Des Moines northwesterly, and it had received from the Northwestern Company as security for these advances a mortgage upon all the property of the Northwestern Company. This mortgage secured an issue of bonds at the rate of $7,000 a mile, which were in default and had been acquired by the purchasing committee. It further appears that, although under the contract of 1882 the Northwestern Company should have contributed a quarter of the expense of acquiring the terminals held in trust for the proprietary companies and was to receive a quarter share in the trust enterprise, the Northwestern Company had in fact advanced only the sum of $3,000, and was insolvent. (Rec., 478.) This discrepancy, between its obligations under the contract of 1882 and the value of the one-quarter share with which it was to be vested in the trust enterprise, proved an obstacle in the consummation of the conveyance of the trust properties to the Des Moines Company as corporate trustee and the distribution of the trust interest in the several amounts provided for in the contract of 1882. There developed therefrom a negotiation between Polk and Hubbell, representing a half stock interest in the Northwestern Company, with the purchasing committee, above described, of the Wabash Company, which resulted in an agreement dated the 10th day of September, 1887, by the terms of which the purchasing committee of the Wabash Company, which latter Company had advanced the moneys which should have been advanced by the Northwestern Company and had succeeded temporarily to the equitable interest of the Northwestern Company, agreed to furnish to Polk and Hubbell the general mortgage bonds of the Wabash Company held by it, secured by mortgage upon the prop-

erties of the Northwestern Company, to enable Polk and Hubbell to bid in the properties of the Northwestern Company at foreclosure sale. (Rec., 1573.)

In consideration of the foregoing, the Northwestern Company was to be reorganized by Polk and Hubbell and the reorganized company was to execute and deliver to the purchasing committee its bond for $450,000, endorsed by Polk and Hubbell, in satisfaction of the Wabash bonds to be delivered, as above described, to Polk and Hubbell and also for the one-quarter interest in the trust properties assigned to the Northwestern Company under the contract of January 2, 1882. (Rec., 1574.)

Simultaneously with the conveyance above mentioned of such one-quarter interest to the reorganized Northwestern Company, the same was to be mortgaged back to the purchasing committee as further security of the bond for $450,000; and, if in the meantime the terminal property should be merged into a terminal company, the bonds and stock received from the terminal company in exchange for this one-quarter interest were to be transferred, in lieu of the property, to Messrs. Polk and Hubbell and retransferred by them to the purchasing committee, to be held by such committee as further security for the payments of the $450,000 above mentioned. (Rec., 1575-1576.)

It thus appears that the above transaction was designed merely to re-establish the Northwestern Company to its original status under the terms of the trust.

When the above arrangement had been agreed upon, the proprietary companies were for the first time in a position to cause conveyance of their trust properties from the individual trustees to the Depot Company under the directions contained in the resolution of Jan-

uary 1, 1885. The resolutions of November 5 and 8, 1887, were addressed to the same objects as the resolution of January 1, 1885, namely, the transfer of the trust properties to the Des Moines Company as corporate trustee, but were more specific and comprehensive in their terms by further providing, in detail, for the distribution of the bonds and stock of the Des Moines Company.

At a board meeting of the Northern Company held November 5, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that How had purchased such property with funds of the Wabash Company, but had taken the title in his name with the understanding that it should be transferred to the Des Moines Company *"under certain conditions."* (Rec., 435.) At the same meeting, another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company *"under certain conditions."* (Rec., 436.)

At a board meeting of the St. Louis Company held November 8, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that he had purchased such property with funds furnished by the Wabash Company, taking the title in his name with the understanding that he should transfer such property to the Des Moines Company *"under certain conditions."* (Rec., 437.) At the same meeting, another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such

property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company *"under certain conditions."* (Rec., 438.)

At the same board meeting of the St. Louis Company November 8, 1887, the following resolution was unanimously adopted:

> *"Resolved*, that the president and secretary of this company be and they are hereby authorized and directed to execute to the Des Moines Union Railway Company, a deed conveying to it all its real estate, rights of way, franchise, roadbed and other property of said company lying and being in the City of Des Moines, east of Farnum street, whether the same was acquired by grant from City of Des Moines or by purchase or condemnation, this resolution being offered *for the purpose of carrying out the contract of date January second*, 1882, *entered into by and between this company, the Des Moines North Western Railway Company, the St. Louis, Des Moines and Northern Railway Company and others."* (Rec., 439.)

At a board meeting of the Northwestern Company held November 8, 1887, a resolution was passed requesting How to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that he had purchased such property with funds furnished by the Wabash Company, taking the title in his name with the understanding that he should transfer such property to the Des Moines Company *"under certain conditions."* (Rec., 442.) At the same meeting another resolution was passed requesting Dodge to transfer to the Des Moines Company certain property, which resolution was preceded by a recital that such property was acquired by him under an agreement with the Wabash Company that it should be transferred to the Des Moines Company *"under certain conditions."* (Rec., 443.)

November 8, 1887, the St. Louis Company notified the Des Moines Company of the passage of the resolutions of its board of November 8, 1887, requesting How and Dodge to convey the property standing in their names to the Des Moines Company, which notice contained a copy of the resolutions as adopted. The St. Louis Company also on the same date, November 8, 1887, notified the Des Moines Company of the resolution adopted by its board November 8, 1887, directing its president and secretary to execute a deed of conveyance to the Des Moines Company, conveying all its rights of way, franchises, roadbed and other property in the City of Des Moines *for the purpose of carrying out the contract of January* 2, 1882, which notice contained an exact copy of the resolutions as adopted. (Rec., 439.)

November 8, 1887, the Northern Company notified the Des Moines Company of the resolutions adopted by its board November 5, 1887, requesting How and Dodge to convey to the Terminal Company the property purchased by them and standing in their names. This notice contains a copy of the resolutions as adopted. (Rec., 441.)

November 8, 1887, the Northwestern Company notified the Des Moines Company of the resolutions adopted by its board November 5, 1887, requesting How and Dodge to convey to the Des Moines Company the property purchased by them and standing in their names. This notice contains a copy of the resolutions as adopted. (Rec., 442.)

On the same day, to wit, November 8, 1887, a meeting of the directors of the Des Moines Company was held, there being present How, Runnells, Hubbell, Polk and Hays. (Rec., 1299.)

At this meeting a preamble and resolution was adopted

which recited the previous action of the St. Louis Company, the Northern Company and the Northwestern Company, as above, and directed

> "That on receipt from the Des Moines and Northwestern Railway Company and the St. Louis, Des Moines & Northern Railway Company and the Des Moines & St. Louis Railway Company and from James F. How, trustee, and G. M. Dodge of deeds to this company of the property standing in their name in the City of Des Moines, that the officers of this company be authorized to issue to said James F. How and G. M. Dodge, respectively, an agreement to deliver to them as soon as prepared, *bonds for the amount of money, with interest and taxes added, which will be shown by them at that time to have been expended by or through them for or on the property referred to.*
>
> The agreement for the delivery of bonds to be turned over to James F. How, trustee, to state that the same are for the benefit of the purchasing committee of the Wabash, St. Louis & Pacific Railway Company; also that the agreement issued by the officers of this company shall state that certificates can be prepared *and the officers of this company will issue to the St. Louis, Des Moines & Northern Railway Company certificates for one-fourth of the stock of the company and to James F. How, trustee, to be delivered to the purchasing committee of the Wabash, St. Louis & Pacific Railway Company certificates for three-fourths of the stock of the company.*" (Rec., 1300.)

It will be noted that the one-fourth stock interest deliverable under the above resolutions to the Northern Company was the interest originally assigned to it by the contract of January 2, 1882.

It will be further noted that the three-fourths stock interest assigned by the above resolutions to the purchasing committee of the Wabash Company represented its predecessors one-half interest under the contract of

January 2, 1882, and, in addition thereto, the one-fourth interest originally assigned to the Northwestern Company and which the purchasing committee had contracted to redeliver to the Northwestern Company as soon as Polk and Hubbell had carried out their undertaking to reorganize the Northwestern Company, as hereinbefore set forth.

Conveyances to the Des Moines Company, pursuant to the resolutions of January 1, 1885, and November 5 and 8, 1887.

The St. Louis Company, pursuant to resolutions of its stockholders of January 1, 1885, the resolutions of its board of directors of November 8, 1887, and the resolutions of the board of the Des Moines Company of January 1, 1885, on February 21, 1888, conveyed by warranty deed all its real estate, rights of way, railroad and franchises in Des Moines to the Des Moines Company. (Rec., 457.) Frederick M. Hubbell signed this deed of conveyance as secretary of the St. Louis Company, and testified that it was made pursuant to the resolution that such conveyance should be made to the Des Moines Company *"for the purpose of carrying out the contract of January 2, 1882."* (Rec., 1115.)

The Northern Company, pursuant to resolutions of its stockholders of January 1, 1885, and the resolutions of the board of the Des Moines Company of January 1, 1885, by quitclaim deed dated November 7, 1887, conveyed certain lots in the City of Des Moines to the Des Moines Company. (Rec., 455.)

The Northwestern Company made no conveyance to the Des Moines Company, as it had no property standing in its name, the property charged to the Northwestern Company having been paid for by the Wabash Com-

pany, and the title taken in the name of How. By the January 2, 1882, contract, the Northwestern Company, in common with the other railway companies, had an interest in the terminal property and the right to use the same in perpetuity.

James F. How as trustee made two deeds of conveyance to the Des Moines Company, one dated November 19, 1887, the other dated April 28, 1888, and one deed individually to the Des Moines Company, dated December 10, 1887. (Rec., 446, 448, 451.) These conveyances were made in pursuance of the resolutions adopted by stockholders of each the St. Louis Company, the Northern Company, and the Northwestern Company, January 1, 1885, the resolutions of the board of the Des Moines Company of January 1, 1885, and the resolutions of the board of directors of the Northern Company November 5, 1887, and of the St. Louis Company and Northwestern Company November 8, 1887. *Each of the deeds recited that the property was acquired and held by him in trust and was conveyed for the purpose and upon the terms set forth in the contract of January* 2, 1882.

Grenville M. Dodge made his deed of conveyance to the Des Moines Company November 7, 1887. (Rec., 453.) This conveyance was made pursuant to the resolution adopted by the stockholders of the Northern Company January 1, 1885, the resolutions of the board of the Des Moines Company of January 1, 1885, and of resolutions adopted by the board of directors of the Northern Company November 5, 1887, and of the St. Louis Company and Northwestern Company November 8, 1887.

All properties conveyed to the Des Moines Company subsequent to those above enumerated, and all the improvements made upon the terminal properties, were paid for either out of the revenue of the Des Moines

Company hereinafter referred to as "Surplus Earnings" or out of the proceeds derived from the sale of its bonds under its mortgage of November 1, 1887. F. M. Hubbell so testified. (Rec., 1095.)

Des Moines Company's Mortgage.

For the purpose of mortgaging the trust properties to reimburse the proprietary companies for the expense incurred by them in acquiring the terminal properties, as provided by Article Third of the contract of January 2, 1882, the Des Moines Company made its certain mortgage dated November 1, 1887. This mortgage recites, among other things, that for the purpose of paying for the property acquired by the foregoing conveyances, and to aid in the construction of the railway of the company, and to complete the necessary and desirable improvements thereon, the Des Moines Company proposed to issue its bonds in the amount of $800,000, to be dated November 1, 1887, payable thirty years after date, to be secured by mortgage covering all of its property, including the property conveyed by the deeds of conveyance from the St. Louis Company, Northern Company, How and Dodge. (Rec., 460, 461.) The execution of this mortgage was ratified by the stockholders of the Northwestern Company and the St. Louis Company at meetings held, respectively, January 2 and 3, 1890. (Rec., 474, 475.)

Meeting of Stockholders of the Des Moines Company of March 31, 1888. (Rec., 476.)

On March 31, 1888, a meeting of the stockholders of the Des Moines Company was held, at which meeting a board of directors was elected. How, on behalf of the St. Louis Company, nominated four persons to be voted for as directors to represent the interests of that company; F. M. Hubbell, on behalf of the Northwestern Company, nominated himself and one other to be voted

for as directors to represent the interests of that company; G. M. Dodge, on behalf of the Northern Company, nominated himself and one other to be voted for as directors to represent the interests of that company. The eight persons so nominated were elected as the board of directors. (Rec., 476.) *At this meeting a resolution was adopted that the St. Louis Company, the Northwestern Company and the Northern Company, their successors or assigns, pay the operating expenses, taxes and interest on the bonds that may be issued under the aforesaid Des Moines Company's mortgage.* (Rec., 477.) A resolution was also adopted reciting that the Wabash Company had expended $382,110.80, G. M. Dodge $74,088.01, Polk and Hubbell $2,000 and the Northwestern Company $3,058.40, for the property acquired for the Des Moines Company, and it was thereupon resolved that a corresponding amount in the bonds of the company be delivered to these parties respectively, in settlement of such expenditures. (Rec., 478.) This settlement was made and bonds were issued accordingly, pursuant to paragraphs third and fifth of the January 2, 1882 contract, which provided that "said company (the Depot Company) may issue and deliver to the companies parties hereto its mortgage bonds to the amount of their respective portions of the cost of said purchases and improvements. (Rec., 412.)

It is to be noted, in the above connection, that, when the issue of shares of stock of the Des Moines Company was authorized by the resolutions of November 8, 1887, above quoted, the distribution of stock to the proprietary companies therein provided for bore no relation to the several sums of money recited above as being advanced by each in purchasing the trust properties, but that such distribution was to be on the basis of the terms of the contract of January 2,

1882, and as also provided for in the hereinafter mentioned agreement supplemental thereto of May 10, 1889, namely one-half to the St. Louis Company and one-quarter to each the Northern Company and the Northwestern Company. (Rec., 483, 711.)

At the meeting of the stockholders held November 1, 1887, of the Des Moines Company a resolution was adopted providing for an amendment to Article 3 of the Articles of Incorporation of the company so as to increase the authorized capital stock of the company from $1,000,000 to $2,000,000. (Rec., 1298.)

Supplemental agreement of May 10, 1889. (Rec., 479.)

This agreement made between the Des Moines Company of the first part and the St. Louis Company, the reorganized Northwestern Company and the Northern Company of the second part, was entered into for the purpose of regulating the user among the proprietary companies of the jointly owned premises, and providing for the distribution of operating expenses, taxes, interest on bonds and so forth.

Col. Wells H. Blodgett, the general solicitor of the Wabash Company, who was present at the stockholders' meeting of the Des Moines Company, held on March 31, 1888, which authorized this agreement and who prepared the same, gives the following testimony as to why this supplemental agreement was suggested:

> "A. It was considered necessary to have something in addition to the agreement of January 2, 1882, for these reasons: In the first place the agreement of January 2, 1882, made no provision for the payment of interest and did not provide how the interest charge should be distributed among the railroad companies using the property. That was one reason. Another reason was, that the contract of January 2, 1882, did not obligate the railroad

companies who were parties to it or their assigns to use the terminal.

Q. Or pay interest?

A. Nor pay the interest. Let me see—there was the interest charge and the matter of using the property, and then the contract of January 2, 1882, put everything, all the expenses of maintenance and operation of all the property on a wheelage basis, and Mr. Hays and General Dodge and all the parties interested thought that the cost of operating the roundhouses should not be on a wheelage basis, but should be distributed among the railroad companies according to the number of engines that were housed and taken care of for each company; and those were the three things wherein, I think, the contract of May 10, 1889, differed from the contract of January 2, 1882.

Q. It was to cover those points?

A. It was for those reasons that all parties agreed it would be advisable to have a supplemental agreement." (Rec., 366.)

As above stated, the agreement had its inception in resolutions passed by the stockholders of the Des Moines Company at a meeting held March 31, 1888. There were present at this meeting Dodge, Polk, Hays, Hubbell, How, Blodgett and Martin. Among other things it was resolved that the Northwestern Company, the Northern Company and the St. Louis Company should pay operating expenses, taxes and interest on bonds *after deducting any amount received from other sources for rental,* prorated on a wheelage basis. (Rec., 477.)

Col. Blodgett was requested to prepare an agreement for thirty years from May 1, 1888, based on the above resolution and covering in detail the conduct and *operation of the Des Moines Company, "said agreement to be approved and executed by all lines now holding an interest in the property."* (Rec., 478.)

Said agreement was to provide that if, at the end of six months from the date of the same, either party to

the contract should feel that the terms of the same were unjust to them, and gave notice to that effect, it was to be a matter of readjusment.

And it was further resolved

> "that the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a supplemental agreement to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals." (Rec., 478.)

Pursuant to the resolutions above recited, the supplemental agreement of May 10, 1889, was made and executed. (Rec., 479.)

After reciting, among other things,

that the first party was the owner of valuable terminal facilities;

that the second parties have railroads in the State of Iowa which terminate at or run into and through the City of Des Moines and in order to prevent expense and facilitate public convenience, it had become important that the second parties should have the use of such terminal facilities;

and that for the protection of the parties thereto and their assigns, "it is important that the rights, duties and liabilities of each in regard to the whole subject matter of said terminal facilities, including their use, care, control, rental, taxes, expenses, renewals, insurance and repairs, shall be stated and defined";

It was agreed:

Section One: That the Des Moines Company was to provide, when its board of directors should deem expedient, a union passenger station and appurtenances for the use of the proprietary companies and shall acquire the additional real estate necessary therefor. (Rec., 480.)

Section Two: This relates to determining the amount of property required for the passenger depot. (Rec., 480.)

Section Three: The second parties agree to pay to the first party certain sums of money to be ascertained as follows. (Rec., 481.)

First: Five per cent interest upon the first party's mortgage bonds, "*less any deduction hereinafter provided for.*"

Second: The cost of maintenance, repairs, taxes and insurance shall be ascertained monthly.

Third: The cost of operation, except the expenses specified in Section Nine (relating to engines), shall be ascertained monthly.

Section Four: This reads:

> "Having so ascertained the monthly aggregate of all the items and sums mentioned in the preceding section, there shall be deducted therefrom the amount, if any, which other railway companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month, and the remainder shall be paid by the parties of the second part in the proportion that the wheelage of each of said parties bears to the entire wheelage of all said second parties during such preceding month." (Rec., 481.)

Section Five: The second parties are to pay on a wheelage basis any sums in default due from other railroad companies for the use of the property. (Rec., 481.)

Section Six: The Des Moines Company is to maintain the premises, provide engines, employees, the moving and handling of cars of the second parties, and to switch cars and handle all freight, and house and care for all engines of the second parties. (Rec., 482.)

Section Seven: The accounts are to be presented monthly. (Rec., 482.)

Section Eight: The contract is made retroactive from May 1, 1888, as relating to rental necessary to pay interest upon mortgage bonds. (Rec., 482.)

Section Nine: This provides for the distribution of expense for caring for and repairing engines and operating engine houses. (Rec., 482.)

Section Ten: This provides that upon default in payment by one of the parties, the first party may, *"with the consent of the remaining parties of the second part,"* assign the rights of such defaulting party to any other party for such sum as the board of directors of the first party may determine. (Rec., 483.)

Section Eleven: *"The directors of the party of the first part hereto shall appoint an executive committee, of which each party of the second part shall have one member as its representative."* (Rec., 483.)

Section Twelve: The executive committee is to appoint the managing superintendent of the terminal properties, subject to the approval of the board of directors. (Rec., 483.)

Section Thirteen: The executive committee is to fix the superintendent's salary. (Rec., 483.)

Section Fourteen: This relates to use of terminal properties by passenger trains. (Rec., 483.)

Section Fifteen: The executive committee, subject to the board, shall make and enforce rules and regulations for the operations of the terminals. (Rec., 484.)

Section Sixteen: This relates to insurance. (Rec., 484.)

Section Seventeen: This provides for the keeping of books and accounts relating to such matters of agreement to be open to inspection. (Rec., 484.)

Section Eighteen: This provides for keeping records

of car movements and of all expenditures relating to cars and engines and the handling and switching of the same. (Rec., 484.)

Section Nineteen: This relates to distribution of cost of damages to rolling stock. (Rec., 484.)

Sections Twenty and Twenty-one: These are personal injury and property injury clauses. (Rec., 485.)

Section Twenty-two: This provides that the covenants, conditions and stipulations contained in the contract shall be binding for the term of thirty years from May 1, 1888. (Rec., 485.)

Section Twenty-three: The covenants and agreements of the second parties are several and not joint. (Rec., 485.)

Section Twenty-four: This *should be especially noted.* It provides that the St. Louis Company, as the owner of one-half of the capital stock of the Des Moines Company, "may sell and transfer one-half of said stock or one-quarter of the whole, to such railway company as may be acceptable to a majority of the parties of the second part, *in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto of the second part upon the same terms and conditions as those stipulated for the other parties of the second part.*"

It is then provided that only as aforesaid may other railroad companies be admitted *to the use* of the first party's property without the consent of all the parties of the second part. (Rec., 485-486.)

Section Twenty-five: This authorized the assignment or mortgage by any of the second parties to another railroad company, of all its rights under the agreement, but prohibited a mortgage or assignment of a portion of its rights and privileges therein. (Rec., 486.)

Section Twenty-six: This *should also be especially noted.* It recites that the second parties are entitled to share in the stock of the first party in the following proportions, to wit: The St. Louis Company, one-half; the Northwestern Company, one-quarter; and the Northern Company, one-quarter. It recites further that no shares have been issued, and provides that as the authorized capital of the Des Moines Company is two millions of dollars, or twenty thousand shares, one certificate of ten thousand shares shall be issued to the St. Louis Company, one certificate of five thousand shares shall be issued to the Northern Company and one certificate of five thousand shares shall be issued to the Northwestern Company, *"and all of said certificates shall express upon their face that they are not transferable in whole or in part, without the consent in writing of all the parties of the second part to this agreement,"* except qualifying shares issued to a member of the board of directors, which shall be retransferable to the company on whose request such shares shall be issued without the consent of the other companies. (Rec., 486-487.)

Section Twenty-seven: This recites that the second parties having obligated themselves to pay as part compensation for the use of the premises, a sum sufficient to pay interest on bonds of the first party, issued or thereafter issued, and provides that the first party will not dispose of such bonds except for the purpose of purchasing with them, or their proceeds, additional terminal property. (Rec., 487.)

Section Twenty-eight: This is an arbitration clause. (Rec., 487.)

The following features of the supplemental agreement should be noted to show its significant relationship as a supplement to the contract of January 2, 1382, creating the

trust interests, and as further identifying the proprietary companies with the trust properties.

First (Section 4): The Des Moines Company was not intended to acquire revenue over and above its cost of operation, as amounts derived from other railroad companies were to be deducted from expenses apportionable among the proprietary companies.

Second (Sections 11, 12, 13, 15): The proprietary companies were to control the management and operation of the Des Moines Company through an executive committee of three, each of the three proprietors to have one representative. The executive committee was to appoint the superintendent of the properties and make and enforce the rules and regulations for the use, management and operation of the terminals.

Third (Section 26): (A provision wholly foreign to the ordinary operating agreement made between railroads occupying co-ordinate positions.) The respective interests of the proprietary companies in the trust properties, as provided for in the contract of January 2, 1882, are recited and it is then provided that the authorized capital stock of two million dollars, shall be distributed in the relative amounts so originally assigned, namely:

One-half to the St. Louis Company and one-quarter each to the Northwestern and the Northern Companies, *in single certificates, nontransferable except by unanimous consent of the second parties to the agreement.*

Fourth (Section 24): The one exception to the above rule was that the St. Louis Company might transfer one-half of its interest, or one-quarter of the whole stock of the Des Moines Company, to such railroad company as might be acceptable to a majority of the parties of the second part. Only as aforesaid were other railroad com-

parties to be admitted to the use of the terminals without unanimous consent of the parties of the second part.

Fifth: That with the transfer of an aliquot portion of stock to another railroad company within the limitations of Section 24, went always a concomitant of user on a parity with the original proprietors. Thus the prerogatives of a tenant in common would be vested in each successive railroad stockholder acquiring its stock with unanimous consent (except in the one instant noted) of the other stockholders.

Sixth (Section 5): If any outsider so admitted defaulted in its obligations, the second parties were to reimburse the first party on a wheelage basis for the amount of such default, thus showing the responsibility of proprietors to protect their own interests.

Seventh (Sections 3 and 27): The second parties were to pay the interest on the mortgage bonds and the Des Moines Company had no right to dispose of bonds, except for the purpose of purchasing with them, or their proceeds, additional terminal property or for improving or equipping that now owned by the Des Moines Company. (Rec., 479-488.)

There was no provision for the payment by the proprietary companies of any rental or compensation for the use of the terminal properties, or for the service that the Des Moines Company obligated itself to render to the proprietary companies.

Finally it should be noted that it is the stockholders of the Des Moines Company, in their resolution of March 31, 1888, who are resolving alone that the Northwestern, the Northern and the St. Louis Companies shall assume the expenses, taxes and interest on bonds of the Des Moines Company, as subsequently set out in the agreement of May 10, 1889, and who are providing that said

agreement shall "be approved and executed by all the lines now holding an interest in the property." (Rec., 476.) This resolution was unanimously adopted by the stockholders, including F. M. Hubbell. (Rec., 479.)

From the foregoing it seems proper to assert, as an ultimate fact, that the supplemental agreement is, in a court of equity, nothing more than a written agreement between the equitable owners of the terminal property and their own trustee in possession settling the details of operation and accounting until May 1, 1918.

On May 18, 1889, the directors of the Northwestern Company approved and authorized the execution of the same, and on May 25, 1889, a similar resolution was adopted by the directors of the St. Louis Company. (Rec., 1454, 1433.) The agreement was duly executed by the parties thereto on May 25, 1889. (Rec., 1597.)

The amended articles of the Des Moines Company. (Rec., 488.)

In 1886 John S. Runnells, who for many years had been the local attorney of the Wabash Company at Des Moines, resigned to take up work at Chicago. (Rec., 359.) He was succeeded by A. B. Cummins, who was the personal counsel of the defendant Hubbell, and of all the Hubbell interests. At the same time Mr. Cummins was appointed general counsel of the Des Moines Company. (Rec., 1204, 1211, 1233, 1236.) Although General Dodge was at this time nominally the president of the Des Moines Company, he resided at New York and the whole management of the Des Moines Company was left to the defendant F. M. Hubbell, who, in addition to being an officer and a director of the same, was regarded as a con-

fidential agent of the Wabash Company at Des Moines. (Rec., 132-136, 233.)

In January, 1890, Mr. Cummins, acting ostensibly on his own initiative and independently of the defendant Hubbell, set about to procure amendments to the articles of incorporation of the Des Moines Company.

At a meeting of the stockholders of the Des Moines Company held January 3, 1890, at the suggestion of Mr. Cummins

> "James F. How moved that the question of amending the articles of incorporation of this company, as well as the question concerning the issue of stock for the purchase price of the property, be referred to Attorneys W. H. Blodgett and A. B. Cummins for their investigation and recommendation." (Rec., 1307.)

No report was ever made by this committee, and it appears from the correspondence that no conference took place between Blodgett and Cummins, but that Cummins alone redrafted the proposed amendments to the articles of incorporation. In a letter by Cummins to Dodge, dated January 27, 1890, Cummins explains that the amendments were directed to two purposes.

First, to clear up the ambiguity and uncertainty with respect to the amount of stock to be issued on account of the original purchase of the property.

Second, to enable the Des Moines Company to act in all matters, without the previous authority of three corporations. (Rec., 1212.)

In respect to this latter subject matter, he explained in the letter to Dodge:

> "I have endeavored to protect the interest of the minority as fully as it is protected in the present articles, that is to say, under the amendments as now proposed the company cannot do anything of im-

portance without the affirmative vote of the *one quarter of* the stock which your road will represent or the vote of one of the directors which you will always be able to control. By this arrangement, you will have *as effective a negative upon the* conduct of the company exerted directly by your stock, as you now have by requiring the previous formal action of the Des Moines & Northern Railway Company. I have given the matter the most careful attention, and while Mr. Hubbell was at first disposed to oppose the amendments which I have prepared, after a full explanation with him, I believe that he will support them. If this reaches you before he leaves New York, it will be well to talk the matter over with him. In any event give me your ideas as fully as you can, and particularly if you do not expect to be here." (Rec., 1212.)

At the time this letter was written, the defendant Hubbell was in New York, endeavoring to purchase an interest in the Des Moines Company. (Rec., 1013.)

On February 5, 1890, as will be set forth more in detail in the next subdivision of facts, Hubbell acquired from the purchasing committee of the Wabash Company one-half of its interest in the capital stock of the Des Moines Company, being one-quarter of the total interest in such stock. (Rec., 1599.)

On February 11th, the purchasing committee made a memorandum of agreement between it and Hubbell, wherein it was provided that the ownership of one-eighth of the stock in the Des Moines Company would permit one director to be nominated by any person or corporation holding one-eighth of the stock in such company. (Rec., 1601.)

The amendments to the articles of the Des Moines Company were passed at a so-called stockholders' meeting held at Des Moines, April 8, 1890. (Rec., 488.) No stock certificates of interest in the company had been issued

at this time. (Rec., 711.) The record of the meeting shows as present in person: How, Hays, F. M. Hubbell, Martin, F. C. Hubbell and Cummins, representing each one share, and present by proxy: Dodge and Blodgett, each representing one share. It is then recited that the Northwestern Company was present by Hubbell, its president, the Northern Company by Cummins, its vice president, and the St. Louis Company by How, its president.

It is, however, conceded that no one of these individuals held a proxy authorizing him to represent the interest of the company and that the directors of none of the three companies authorized any action to be taken amending the articles of the Des Moines Company. (Rec., 1165-1169.)

At this meeting the following amendments were adopted upon the vote of the eight individuals above named recorded as owning one share each of the Des Moines Company's stock (Rec., 489):

Article 1: This was not substantially changed. (For original articles see Record, 416.)

Article 2: The principal change in this article was the elimination of the provision that all powers exercised by the company should be in accordance with the terms and spirit of the January 2, 1882, contract, and the right of the company to lease or dispose of the use of any part of its franchise to any other railway company with the assent of the three Railway Companies.

Article 3: This was changed so as to provide, (a) for the increase formerly made by resolutions of March 31, 1888, of the authorized capital stock from $1,000,000 to $2,000,000; (b) the amount of stock to be paid for and actually issued; and (c) that all previous resolutions and issue of such capital stock be set aside.

Article 4: This was changed so as to provide that at all future elections of directors, *more than* seven-eighths of the votes of all the stock theretofore issued should be required to elect any director, *and that as to all matters except the ordinary operation of the property of the company the board of directors could act only upon the unanimous vote of the eight members of the board.*

Article 5: There was no substantial change made in this article excepting to provide for the annual election of the officers of the company, and that such officers might exercise such powers and be charged with such duties as usually pertain to their respective offices.

Articles 6, 7 and 8 were not changed.

Article 9: *This was changed so that the articles could be amended only by a vote of more than seven-eighths of all the stock instead of by three-fourths.*

Article 10: This was not changed.

There were added to the articles five new articles, to wit: Article 11, Article 12, Article 13, Article 14 and Article 15.

Article 11 related to the calling of special meetings of the stockholders.

Article 12 provided that each stockholder should have one vote for each share of stock owned, such vote to be cast either in person or by proxy.

Article 13 provided that it was not necessary in order to enable the company to carry on its business that all its authorized stock be issued.

Article 14 *approves, ratifies and confirms the purchase of the property theretofore conveyed to the Des Moines Company, and the conveyances made in pursuance thereof to that company, as well as the execution of the trust mortgage of that company.*

Article 15 purports to repeal, strike out and expunge the proceedings of the first meeting of the incorporators of the company held December 10, 1884, with certain preambles, which include the January 2, 1882, contract. (Rec., 416.)

Briefly stated, the effect of these amendments, if valid, was:

(a) To expunge from Article 2 of the original articles the provision that all powers exercised by the company should be in accordance with the terms and spirit of the January 2, 1882 contract, and that the right of that company to lease or otherwise dispose of the use of any part of its franchise to any other railway company could be exercised only on the assent of the three Railway Companies. With these exceptions, there remains no substantial difference between Article 2 of the original articles and Article 2 of the amended articles.

(b) To provide that 4,000 shares, aggregating $400,000, of capital stock together with the first mortgage bonds theretofore issued for that purpose constitute the fair value of the terminal properties acquired by the Des Moines Company. That of such total number of shares 2,000 be issued to the purchasing committee, 1,000 to the Northwestern Company and 1,000 to the Northern Company, and that the remaining capital stock, to wit, 16,000 shares or any part thereof, shall be issued only by authority of a resolution of the stockholders adopted by vote of *more than seven-eighths* of all the stock theretofore issued.

(c) To provide that *more than* seven-eighths of the votes of all the stock issued should be required to elect any director of the company, and that the board of directors could act only upon the unanimous vote of the eight members thereof.

(d) To require the vote of more than seven-eighths of all the stock to amend the articles of the company.

(e) To approve, ratify and confirm all purchases of property theretofore conveyed to the Des Moines Company and the conveyances made in pursuance thereof to such company, as well as the execution of the mortgage of that company.

(f) To attempt to repeal, strike out and expunge from the company's records the proceedings of the first meeting of the incorporators of the company, held December 10, 1884.

Particular attention is called to the limitations in the foregoing amendments that *more than seven-eighths* of the votes of all the stock issued shall be required to elect any director and to amend the articles of the company, and that the board of directors could act only upon the unanimous vote of the eight members thereof. These limitations should be read in the light of the transactions and correspondence hereafter set forth in the third subdivision of facts which establish a definite agreement among the representatives of the three proprietary companies that a one-eighth stock interest in the Des Moines Company shall be sufficient to represent "a proprietorship" in the Des Moines Company.

Annual Reports made by the Des Moines Company to the Executive Council of the State of Iowa for the purpose of the assessment of its properties for taxation by said Council. (Rec., 721.)

On December 31, 1888, 1889, and 1890, and on January 1, 1892 and 1893, the Des Moines Company made an annual report to the executive council of the State of

Iowa for the purpose of taxation. In each of these reports appears the following:

> "The Des Moines Union Railway Company is simply a 'Representative Company' acting as an agency at Des Moines for the Wabash Railroad Company, the Des Moines and Northwestern Ry. Company, and the Des Moines and Northern Railway Company, performing all the necessary work for them and charging each road at actual cost, its due proportion of the expense, thereby incurred. (Rec., 721.)"

These reports were under oath and the report for the year 1888 was verified by James F. How, vice president of the Des Moines Company and J. B. Van Dyne, general superintendent.

The report for 1889 was verified by Horace Seeley, general superintendent of the Des Moines Company.

The report for 1890 was verified by A. B. Cummins, vice president of the Des Moines Company, and Horace Seeley, general superintendent.

The report for 1891 was verified by F. C. Hubbell, president of the Des Moines Company, and Horace Seeley, general superintendent.

The report for 1892 was verified by A. B. Cummins, vice president of the Des Moines Company, and J. A. Wagner, superintendent. (Rec., 721-723.)

The fiduciary relations of F. M. Hubbell to the constituent companies in the trust and to the Des Moines Company.

F. M. Hubbell held in such companies positions as follows:

1. The St. Louis Company.
   Director—1880-1891.
   Secretary—1880-1891. (Rec., 1296.)

2. The Northwestern Company:
   Director—1881-1886.
   Treasurer—1881-1883, 1885-1886.
   Asst. Treasurer—1884.

3. Reorganized Northwestern Company:
   Director—1887-1892.
   President—1887-1892.

4. The Northern Company:
   Director—1881-1890.
   Treasurer—1881-1883.
   Secretary and Asst. Treasurer—1884.
   Vice President—1885-1888.
   Asst. Secretary and Treasurer—1889.
   Secretary—1890.

5. The consolidated corporation formed by the merger of the reorganized Northwestern and Northern Companies:
   Director—1891-1895.
   President—1891-1895.

6. The Reorganized Consolidated Company:
   Director—1895-1899.
   President—1895-1899.

7. The Des Moines Company:
   Director—1884, to the time of the institution of the suit.
   Secretary—1884, to the time of the institution of the suit. (Rec., 1296.)

At the date of the reorganization of the Northwestern Company, the firm of Polk and Hubbell, through their ownership of the Narrow Gage Railway Construction Company, had acquired and held one-half of the stock of the Northwestern Company. (Rec., 400, 1104.) Under the reorganization of the Northwestern Company as

hereinbefore set forth, Polk and Hubbell acquired a majority of the capital stock of the reorganized company and held the same up to the time of the merger of that company with the reorganized Northern Company. (Rec., 621.)

The controlling interest in the Northern Company at all times was held by General Dodge, although the firm of Polk and Hubbell had acquired a minority interest in the stock through the Narrow Gage Railway Construction Company. (Rec., 1163.)

Upon the merger and consolidation of the reorganized Northern and Northwestern Companies, a majority of the capital stock was acquired by the firm of Polk and Hubbell and was held continuously by the Hubbell interests until the same was sold to the St. Paul Company in 1898.

It thus appears that, at the time of the important transactions involved in this litigation, the defendant F. M. Hubbell was an officer and director of the Des Moines Company and of its three proprietary companies and was the dominating stockholder of the Northwestern Company and of its successor the Consolidated Company.

F. M. Hubbell presented the resolutions adopted by the stockholders of the St. Louis Company and the Northwestern Company and voted for their adoption at the meeting held January 1, 1885, authorizing, among other things, the conveyance to the Des Moines Company of the real estate and franchises of said two Railway Companies in the City of Des Moines. (Rec., 424, 428.)

F. M. Hubbell, as a member of the board of directors of the Des Moines Company, voted in favor of the resolutions adopted by that company at a meeting held January 1, 1885, accepting the transfer, management and operation of the property theretofore held by the several

parties acquiring the same in the interests of the three Railway Companies and instructing its president to take such action as should be necessary to render such transfer, management and operation effective as provided in the January 2, 1882 contract. (Rec., 432.)

F. M. Hubbell signed the deed of the St. Louis Company, conveying its title to the properties to be held in the common interest, to the Des Moines Company, as secretary, and testified that such deed was made for the purpose of carrying out the January 2, 1882, contract. (Rec., 457.)

F. M. Hubbell executed the Des Moines Company mortgage, dated November 1, 1887, as secretary of that company. (Rec., 459.)

F. M. Hubbell was present at the stockholders' meeting of the Des Moines Company held March 31, 1888, and acted as secretary of that meeting, which adopted the resolution requesting that the supplemental agreement of May 10, 1889, be made and voted for the same. (Rec., 476.)

F. M. Hubbell signed the supplemental agreement as secretary of the Des Moines Company, as secretary of the St. Louis Company and as president of the Northwestern Company. (Rec., 479.)

Following the execution of the supplemental agreement of 1889, F. C. Hubbell, a son of F. M. Hubbell, and a member of the firm of Hubbell and Son, became the president of and a director in the Des Moines Company and held these offices continuously up to the time of the insituation of the present suit. (Rec., 1183.)

III.

THE INDEPENDENT TRANSACTIONS OF THE HUBBELLS IN RESPECT TO THE TRUST PROPERTY AND THE SEVERAL ALIQUOT INTERESTS EVIDENCED AND MEASURED BY SHARES OF STOCK OF THE CORPORATE TRUSTEE.

On June 12, 1888, Hubbell wrote to O. D. Ashley, president of the Wabash Company, saying:

> "I have been asked several times whether a quarter interest in the Des Moines Union Railway stock could be bought, and, if so, at what price. I, of course, am unable to give any satisfactory answer. If you have a price at which you would be willing to part with a quarter interest in the Des Moines Union Railways Company stock and are willing that I should offer it, I would like to do so. If you do not wish me to offer it for sale, shall I refer the parties to you?" (Rec., 1059.)

On June 16, 1888, Mr. Ashley replied as follows (italics ours):

> "Yours of June 12th received. My impression is that the purchasing committee will be glad to sell a one-quarter interest in the Des Moines Union Railway stocks if they could obtain a fair price for it, but I have always supposed *that it would be necessary to confine the sale to such railway companies as would be interested in the station.* It seemed to be desirable to offer the stock to the Chicago and Northwestern, if we could get that company to come into the station.
>
> *Was there not an understanding or agreement as to the sale of the stock when the Terminal Company was formed and would it not be prejudicial to the interest of the whole to part with the stock to outsiders?*
>
> I should like to hear from you on this point, after which I will bring the subject before the purchasing committee, as soon as possible." (Rec., 1059.)

On June 18, 1888, Hubbell replied to Ashley in part as follows (italics ours):

"Yours of June 16th at hand. *I agree with you that the sale of a quarter interest in the stock of the Terminal Company should be made only to a railway company, who will join with the Wabash in* making a contract with the Des Moines Union, guaranteeing the interest upon the bonds and operating expenses, etc.

I think it would be prejudicial to sell any of this stock to outsiders, and I understand it, as you do, that the stock cannot be sold without the consent of the different railroad companies who now form the Terminal Company." (Rec., 1060.)

Following the exchange of the above letters, the defendant Hubbell suggested that the purchasing committee surrender to the Des Moines Company a portion of the stock issuable to the St. Louis Company under the resolutions of 1887. This proposal was made in connection with the consideration of a preliminary draft of the supplemental agreement of May 10, 1889, prepared pursuant to the resolutions of March 31, 1888. The proposal was rejected on September 17, 1888, in a letter from James F. How to Polk and Hubbell, reading in part as follows:

"Mr. Ashley is in town and I have just had a talk with him concerning the amendments to the proposed contract for the use of the Des Moines Union Depot that you desire, viz.: that the purchasing committee should surrender one-fourth of their stock for the benefit of the Depot Company. Mr. Ashley says that this is an arrangement which he could not agree to on behalf of the purchasing committee being satisfied that they would not approve the surrender of any of their stock without a consideration." (Rec., 1594.)

In the above connection, attention is called to Section twenty-four as embodied in the final draft of the agreement of May 10, 1889 (hereinbefore summarized), providing that the St. Louis Company, as the owner of one-half of the capital stock of the Des Moines

Company, may sell and transfer one-half of said stock or one-quarter of the whole to such railway company as may be suitable to a majority of the parties of the second part, in which case it is agreed that such railway company may be admitted as one of the parties to the agreement of May 10, 1889, upon the same terms and conditions as those stipulated for the other parties to such agreement; and the further proviso that, except as aforesaid, other railroad companies shall be admitted to the use of the terminal property, only upon the unanimous consent of the constituent companies.

Attention is also called in this respect to Section twenty-six which in providing for the issue of shares to the constituent companies, in the proportions allotted under the contract of January 2, 1882, requires that the certificates therefor shall express on their face that they are not transferable in whole or in part, without the consent in writing of all of the constituent companies.

In the early part of February, 1890, Hubbell went to New York to persuade Ashley to give him an option on one-half of the purchasing committee's interest in the Des Moines Company, that is a one-quarter interest in the Des Moines Company. As a result of this, on February 5, 1890, Ashley, as secretary of the purchasing committee, gave the following option in writing:

> "I will give you for the purchasing committee the option of buying of them $135,000 of the bonds of the Des Moines Union Railway Company and one-quarter interest in the capital stock of that company for $135,000 and accrued interest from November 1, 1889, at any time within ten days from this date. Payment to be made in cash if the option is availed of by you." (Rec., 1599.)

Thereupon Hubbell explained the situation to Dodge, who asked to participate in the purchase, by taking one-

half of the optioned stock and bonds. Hubbell consented to this and thereupon closed his option by the following letter addressed to Ashley, dated February 5, 1890 (Rec. 1599):

> "I hereby accept the proposition made by you, for the purchasing committee to me, for the sale to me of $135,000 of Des Moines Union Railway Company bonds, and a one-quarter interest in the capital stock of that company, and hand you now $10,000 and will pay the balance as soon as you deliver the property."

On this letter is endorsed a receipt, dated February 5, 1890, reading:

> "Received of F. M. Hubbell his check for ten thousand dollars on account of $135,000 Des M. U. R. Co. bonds and one-quarter of the stock of said company as per letter written to him by me in behalf of the purchasing committee. O. D. Ashley."

On February 11, 1890, a bill of sale covering one-half of the bonds and one-half of the stock, included in the above option, was executed by Mr. Ashley and delivered to Mr. Hubbell. (Rec., 1601.)

This memorandum of agreement, made between the purchasing committee and Hubbell, recites that in the articles of incorporation of the Des Moines Company it is provided that the Wabash Company shall nominate four directors of the Des Moines Company; that the stock of the Des Moines Company is now held by different parties and in different proportions from what it was when said articles were adopted and that it was agreed therefore between the purchasing committee and Hubbell, who had acquired a one-eighth ownership of the stock of the Des Moines Company, that the purchasing committee would consent to such change in the articles of the Des Moines Company as would permit one director to be nominated by any person or corporation holding one-

eighth of the stock of the Des Moines Company. (Rec., 1031.)

The recital above made that Hubbell had acquired a one-eighth ownership was due to the fact that, by virtue of his understanding with Dodge, the one-quarter interest in the Des Moines Company, although optioned by him, was divided between him and Dodge; and at the same time and as part of the same transaction, a similar agreement covering the other eighth was executed by the purchasing committee and delivered to Dodge. (Rec., 1002.)

At the time of the above transaction, Hubbell began negotiating with the purchasing committee of the Wabash for the purchase of an additional one-eighth share of its interest in the Des Moines Company.

On April 1, 1890, he wrote Ashley as follows:

> "In our last interview at your office it was understood that you would talk with Mr. Joy and Mr. Wells of the purchasing committee and write me upon what terms you would sell a one-eighth interest in the capital stock of the Des Moines Union Railway Company. Thinking that this matter might have escaped your memory I beg to say that I would like to hear from you in regard to it." (Rec., 1061.)

Ashley replied on April 5, 1890, as follows (our italics):

> "I have yours of April 1st this morning. The result of my conversation with Messrs. Joy and Wells is a rather vague idea that we ought not to sell $100,000 of the Des Moines Union Railway Terminal bonds and one-eighth interest in the capital stock at less than $115,000 and accrued interest on the bonds, and I do not feel authorized to offer it at any less price. If, however, you will make me a definite bid of the best price you can, I will communicate it to the other members of the committee and will give you an early and definite reply. *It must be understood, of course, that a one-eighth interest in the capital stock shall be sufficient to represent a pro-*

prietorship in the company according to the understandings we had when you were here.'' (Rec., 1602.)

Hubbell accepted the terms proposed and consummated the purchase of the additional bonds and an additional one-eighth interest in the Des Moines Company, on June 5, 1890. (Rec., 1080.)

On June 5, 1890, a bill of sale was made by the purchasing committee to Hubbell, selling him fifty bonds of one thousand dollars each of the Des Moines Company and one-eighth of its capital stock for the sum of $57,763. The bill of sale also provided that, upon payment of the above sum, the purchasing committee would deliver said five hundred shares to Hubbell by a certificate transferred by endorsement; and it further agreed to have the same transferred on the books of the Des Moines Company, so far as the vote of the directors of the Des Moines Company representing the St. Louis Company will secure said transfer. (Rec., 1613.)

Pursuant to the above, in due course, the certificate above provided for was issued to Hubbell.

At a stockholders' meeting of the Northwestern Company held on October 12, 1891, at which meeting it appeared that F. M. Hubbell and F. M. Hubbell and Son held sixty-five hundred shares and G. M. Dodge thirty-five hundred out of a total of ten thousand and four shares, it was resolved to consolidate the Northwestern Company with the Northern Company, pursuant to the terms of a certain agreement, set out in full in the resolution, made between Dodge and Humphreys as first parties and Hubbell as second party. In this agreement Dodge agreed to convey to the consolidated company, among other things, one-eighth of the capital stock of the Des Moines, being the stock acquired by him from the purchasing committee of the Wabash Company, and

Hubbell agreed to convey to the consolidated company one-quarter of the capital stock of the Des Moines Company, being the two-eighths of the stock acquired by him in February and in June, 1890, from the purchasing committee of the Wabash Company, and to receive as consideration for his two-eighths share $60,000 in first mortgage bonds of the consolidated company. (Rec., 1461.)

At the time of the consolidation of the Northern and Northwestern Companies each of the companies held a one-fourth interest in the capital stock of the Des Moines Company, these shares being the shares originally assigned to each of said companies under the contract of January 2, 1882.

In addition to these shares Dodge and Hubbell undertook to transfer to the consolidated company their aggregate three-eighths interest mentioned above, so that it was contemplated that the consolidated company upon its formation would become the owner of seven-eighths of the stock of the Des Moines Company, the other eighth remaining in the hands of the purchasing committee of the Wabash Company.

The parties also agreed that contemporaneously with the consolidation of the Northern and Northwestern Companies, the consolidated company should execute and deliver to the Metropolitan Trust Company of New York a trust mortgage upon all of the properties so acquired by it, except stock of a certain coal company and five-eighths of the capital stock of the Des Moines Company. (Rec., 1462.)

Pursuant to the above arrangement, Dodge and Hubbell transferred their respective interests in the Des Moines Company to the consolidated company and the certificates were issued on January 15, 1892. (Rec., 711.)

Thereafter, pursuant to a resolution passed by the board of directors of the consolidated company on October 4, 1893, said five-eighths ($250,000 par value) of the stock of the Des Moines Company was pledged with nineteen one thousand-dollar bonds of the Des Moines Company to F. M. Hubbell & Son, to secure an indebtedness owing Hubbell & Son by the consolidated company of $122,000. (Rec., 1480-1481.)

On January 29, 1894, at a meeting of the board of directors of the consolidated company, at which were present: Hubbell, Martin, Cummins, Denman and Thompson, a resolution was passed reciting that the company was indebted to F. M. Hubbell & Son in the amount of $128,833.33, which indebtedness was long past due; that the company had in its treasury certain of its first mortgage bonds, amounting to $225,000, which it has been unable to dispose of at 55 per cent of their par value, although in its said efforts said bonds were offered to each of the stockholders of the company, as well as in the markets at said price; that the company was also the owner of 2,500 shares of the capital stock of the Des Moines Company, *"which shares of stock have no market value"*; that Hubbell and Son have offered to accept said $225,000 first mortgage bonds at 55 cents on the dollar of their face value and have offered to purchase said capital stock of the Des Moines Company at 10 per cent of the par value thereof, and to cancel therefor the debt of the consolidated company to Hubbell and Son, and to assume and pay a certain indebtedness of the consolidated company, amounting to $20,000, to the Metropolitan Trust Company; and which thereupon resolved that the treasurer of the company be authorized and directed to transfer to Hubbell and Son said bonds and said shares of stock, upon surrender of the notes of the consolidated company, evidencing the $128,000 of

debt, and upon receiving an agreement from Hubbell and Son to pay the debt due the Metropolitan Trust Company. The records show that this resolution unanimously passed with F. M. Hubbell not voting. (Rec., 1482-1484.)

Although F. M. Hubbell abstained from voting at the meeting, it is undisputed that he was in complete control of the company. Of the seven members of the board of the company, three (F. M. Hubbell, F. C. Hubbell and H. D. Thompson) were members of Mr. Hubbell's family, and a fourth (A. B. Cummins) was the personal attorney for the Hubbell interests. (Rec., 1096.)

Following the pledge of the above shares to Hubbell and prior to the actual purchase of the shares, a meeting of the board of directors of the Des Moines Company was held, to wit: On October 4, 1893, at which the following minute was adopted:

> "The Des Moines & Northwestern Railway Company, by its president, F. M. Hubbell, stated that they had found it necessary to transfer 2,500 shares of their stock in the Des Moines Union Railway Company to F. M. Hubbell and Son, by Certificate No. 26, dated October 4, 1893, and asked that the directors of this company consent to the transfer above mentioned."

Thereupon it was resolved that the consent to such transfer be given. (Rec., 1333.)

On the same date these shares were transferred in the name of F. M. Hubbell and Son on the books of the Des Moines Company and continued under that same registered number up to the institution of this suit. (Rec., 711.)

An examination of the records will disclose that no approval of the above transaction was given by Wabash Company or the St. Louis Company, as required pur-

suant to Sections twenty-four and twenty-six of the Supplemental Agreement of May 10, 1889.

Following the above transaction whereby Hubbell & Son obtained possession of five-eighths of the stock of the Des Moines Company a report was made to the executive counsel of the State of Iowa differing materially from the reports made for the years 1888, 1889, 1890, 1891 and 1892 hereinbefore set out. These earlier reports all stated that the Des Moines Company was merely a representative company acting as an agency at Des Moines for the three proprietary companies. The report for 1893 which was verified by A. B. Cummins, vice president of the Des Moines Company, and J. A. Wagoner, superintendent, the first named being the personal attorney of the Hubbell interests, contained the following statement:

> "The Des Moines Union Railway Company is the owner of the property hereinbefore described and in addition to leasing the same to the Wabash Railroad Company the Des Moines, Northern and Western Railway Company and the Chicago Great Western Railway Company perform certain services for these companies and collect from them as rental for such services the aggregate amount of its expenses, which expenses are paid by the several railway companies in proportion to the use of the property and services rendered, as provided by contracts existing between this company and the said Wabash Railroad Company, the Des Moines, Northern and Western Railway Company and the Chicago Great Western Railway Company." (Rec., 724.)

Agreement of July 31, 1897. (Rec., 506.)

On July 31, 1897, a so-called agreement of ratification and confirmation was entered into between the Wabash Company, the Des Moines Company and the Consolidated Company, F. C. Hubbell signing as president for the last

two companies. This agreement recites the existence of the supplemental agreement of May 10, 1889, the parties thereto; that the Wabash Company now operates the St. Louis Company; that the Northwestern Company and Northern Company have ceased to own and operate their respective railroads, and that the consolidated company is now the owner of the same; that the Wabash Company and the consolidated company had been using the terminal properties for a long time past and that it is doubted whether said contract is legally binding upon the Wabash Company and the consolidated company. It is thereupon agreed that the contract shall become binding upon these two last named companies, as successors to their respective predecessors, and it concludes with the statement:

> "that so much of said contract, a copy of which is hereto attached, as relates to the issuance and distribution of the capital stock of the said Des Moines Company, is no longer binding and that the capital stock of the said Des Moines Company is held as follows:
>
> 500 by the purchasing committee of the Wabash Company.
>
> 1,000 by the Des Moines & Northwestern Railway Company.
>
> 2,500 by F. M. Hubbell and Son.
>
> A list is also given of shares issued qualified directors." (Rec., 506.)

The evidence introduced by the Hubbells in support of their plea of estoppel and laches.

The Hubbells have set up in their answer, among other things, the following:

> "That the facts with reference to the ownership of the terminal property and stock in controversy have been known to the complainants and to their predecessors in interest ever since the dates of the

transactions complained of and were so known to the complainants and their predecessors in interest for many years prior to the commencement of this suit and that the complainants have been guilty of laches and their claims are stale and are barred and are not cognizable in equity." (Rec., 193.)

As supporting this plea of estoppel and laches, the Hubbells introduced certain evidence of negotiations occurring in the ten-year period between 1897 and the date of the institution of this suit, between the operating officials of the Wabash and St. Paul Companies and themselves, for an operating contract in substitution for, or in extension of, the supplemental contract of May 10, 1889, all of which negotiations failed.

In so far as these negotiations are concerned, as well as the "series of acts and circumstances" referred to in the majority opinion of the Circuit Court of Appeals we ask the Court to keep constantly in mind in connection with the defense of estoppel, namely, that the Hubbells themselves were the officers and directors of the Des Moines Company upon whom the proprietary companies and their respective operating and other officials were accustomed to rely for all information respecting the trust enterprise. Mr. How, who represented the Wabash Company during the development of the enterprise, retired as a director of the Des Moines Company in 1892 and died prior to 1897. (Rec., 1677.) The late Chas. M. Hays, who later was the active representative of the Wabash Company, resigned in 1895 and was succeeded by Joseph Ramsey, Jr. (Rec., 1659.) For all information respecting the terminals Ramsey was dependent on the Hubbells. (Rec., 1666.)

The St. Paul Company was a stranger to the terminal enterprise until 1898, when it purchased the property of the reorganized Consolidated Company and the officials

of the St. Paul Company were dependent upon the Hubbells for all information respecting not only the terminal enterprise but also the Consolidated Company.

A careful analysis of certain of the documents offered by the Hubbells in support of their plea of estoppel will develop a studied abuse of this relation of confidence.

It is sufficient in this connection to refer two letters which they themselves have offered in evidence.

On December 2, 1898, following the purchase of the consolidated company by the St. Paul Company, Mr. Roswell Miller, president of the last named company, wrote F. M. Hubbell as follows:

> "I observe that the contract between the Des Moines Union Railway Company and the Des Moines Northern and Western Railroad Company is only for twenty years. I think it should be for fifty years. Have you any objection to extending it for so long?" (Rec., 1765.)

And on the same date Mr. Miller wrote asking Hubbell to send copies of any trackage contracts that were in existence. (Rec., 1766.)

On the following day F. M. Hubbell replied stating that there was no trackage contract except *the lease* (our italics) with the Des Moines Union Railway Company, a copy of which he had previously given to the St. Paul Company, which was of course the supplemental contract of May 10, 1889. It thus appears that at the very outset of his dealings with the St. Paul Company F. M. Hubbell deliberately suppressed the contract of January 2, 1882. (Rec., 1767.)

The Hubbells' claim that the properties of the Des Moines Company were not held in trust for the use and occupation of the complainants thereby presenting the controversy as to the so-called Surplus Earnings.

No question as to the equitable ownership of the terminal properties by the proprietary companies was ever made until October, 1905, when at a meeting in Chicago between the officers of the St. Paul and Wabash Companies and F. M. Hubbell the disposition of the so-called surplus earnings of the Des Moines Company, which had recently become a subject of controversy, was under consideration.

The history of the controversy as to the so-called surplus earnings is briefly as follows:

At the time of the execution of the supplemental agreement of May 10, 1889, it was contemplated that the only source of revenue of the Des Moines Company, independent of the contributions made by the proprietary companies, would be rentals paid by other railway companies admitted by contract to the use of the terminal properties.

Shortly afterwards, however, other sources of revenue developed. These were the switching of cars to and from industries adjacent to the terminal properties and rentals for unused office space in the Union passenger station.

The question then arose as to the proper disposition of these unexpected revenues.

Under the supplemental agreement of May 10, 1889, all expense incident to the ownership and operation of the terminal properties was charged against the proprietary companies on a wheelage basis and bills there-

for were rendered monthly. In determining the amount payable by each proprietary company there was, however, deducted from the bill its proportionate share on a wheelage basis of

> "The amount, if any, which other railroad companies may be under obligation to pay by virtue of contracts for the use of said property, or parts thereof, for the preceding month." (Rec., 481.)

It is reasonably clear that switching charges and rentals from the station property are within the purview of the language above quoted, and the subsequent conduct of the parties confirms such construction.

The board of directors of the Des Moines Company at a meeting held February 11, 1891, adopted a resolution ordering:

> "That the rents collected for the use of the company's real estate and the switching charges paid in be credited on the bills of the different tenant companies occupying this company's terminals, giving to each company its share ascertained by wheelage." (Rec., 497.)

This resolution was adopted by the unanimous vote of the eight directors of the Des Moines Company, including the defendant F. M. Hubbell, and particular attention is called to it as it is in line with the provisions of the supplemental agreement that the proprietary companies should have the full use and benefit of the terminal property including the proposed union depot building to be erected for their "use." (Rec., 480.)

Pursuant to the above resolution of the board of directors of the Des Moines Company all revenues from outside sources were credited to the proprietary companies on their monthly bills until January 7, 1892, when the board of directors adopted the following minute:

> "Whereas this company is in need of a cash capital with which to purchase supplies and pay current bills

which come in before it receives its monthly revenue from the tenant companies, therefore be it resolved: That until the further action of the board the sums received as rents of real estate and all switching charges shall not be credited upon the accounts of the tenant companies but shall be used for the aforesaid purposes." (Rec., 499.)

On March 1, 1892, the auditor of the Wabash Company wrote to the superintendent of the Des Moines Company inquiring why no credit for switching revenues and rentals of real estate had been made on the bills for the preceding two months.

To this letter the superintendent of the Des Moines Company replied as follows:

"DES MOINES, IOWA, March 2, 1892.

D. B. Howard, Auditor,
Wabash Railway,
St. Louis, Mo.

DEAR SIR:

Replying to yours of the 1st inst. in regard to the allowance of switching, rentals, etc., that should be made on our bills for the months of December and January, I have to say that at a meeting of the executive committee held January 7, 1892, it was decided not to distribute these collections for a period of time until the Des Moines Union Railway Company could accumulate a small fund for working capital. I presume this will continue in effect until January, 1893. You will be furnished each month a statement showing the amount of this rental and your proportion of the same so you can make a charge against the D. M. U. Railway Company and carry it on your books as you see fit for future adjustment.

Yours very truly,
HORACE SEELEY,
Superintendent."

This is written on the letterhead of the Des Moines Union Railway Company, general offices, G. M. Dodge,

president, F. M. Hubbell, secretary, H. Seeley, superintendent. (Rec., 338.)

Following the above action of the board of the Des Moines Company the outside revenues derived from switching and real estate rental were accumulated in a separate cash fund to be used as working capital. In the earlier period of the enterprise these earnings were relatively small and a number of years elapsed before a substantial fund had been accumulated. In the meanwhile the Hubbells had caused the consolidated company to transfer to the firm of F. M. Hubbell & Son 2,500 shares of the stock of the Des Moines Company, and when the St. Paul Company and the Wabash Company, having ascertained that the fund had accumulated in an amount greatly in excess of the requirements of the Des Moines Company for working capital, suggested that the excess be distributed among the proprietary companies in accordance with the practice and understanding of the parties, as evidenced by the resolution of February 11, 1891, the Hubbells failed to comply with the request. The subject became a matter of controversy which culminated in a meeting at Chicago in October, 1905, when the defendant F. M. Hubbell stated that he would not consent to the distribution of any part of the surplus earnings and that, moreover, upon the expiration of the supplemental agreement on May 1, 1918, the St. Paul Company and the Wabash Company could not have the right to use the terminals except upon such terms and conditions as *he* might make. (Rec., 329, 333.)

At the next meeting of the directors of the Des Moines Company representatives of the St. Paul Company and of the Wabash Company each filed a written protest against the refusal of the Des Moines Company to credit the surplus earnings in reduction of the monthly bills

rendered against the proprietary companies and made formal demand that without further delay all monies arising from rents of real estate, switching charges, etc., theretofore and thereafter collected, be credited on the bills rendered against the proprietary companies on a wheelage basis. (Rec., 334.)

Within a year thereafter the complainants commenced the present suit. (Rec., 3.)

BRIEF OF ARGUMENT.

I.

BY THE TERMS OF THE CONTRACT OF JANUARY 2, 1882, THE ST. LOUIS COMPANY, THE NORTHWESTERN COMPANY AND THE NORTHERN COMPANY, PREDECESSORS OF THE COMPLAINANTS, ESTABLISHED FOR THEIR JOINT AND SEVERAL BENEFIT AN EXPRESS TRUST IN CERTAIN RAILROAD PROPERTIES THERETOFORE ACQUIRED IN THEIR COMMON INTEREST.

(1) The terms of the trust so created by this instrument were as follows:

It is recited:

(a) That "the companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance at their joint expense for (of) terminal facilities in the City of Des Moines *to be held and used in common as hereinafter provided.*" (Rec., 412.)

(b) That in pursuance of said agreement various purchases have been made of real property in the City of Des Moines by a number of parties, individual and corporate. (Rec., 412.)

It is then agreed:

(a) That the expense of such purchases shall be borne in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies *and "that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said company may issue and deliver to the companies, parties hereto, its mortgage bonds* to the amount of their respective portions of the cost of the said purchases and improvements." (Rec., 412.)

(b) That "the title to said property is to *be and*

remain in a trustee to be named by agreement of said companies *but subject to the joint use and occupation of all of said railway companies upon the terms herein described.*" (Rec., 412.)

(c) That the individual signers to the agreement "hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quitclaim and convey the same to said *trustee upon demand and reimbursement.*" (Rec., 412.)

(2) Under the terms of the trust the status of the proprietary companies was as follows:

(a) With respect to the premises subject to the trust the equitable interest of each was that of proprietorship, equivalent to an estate in fee in real property.

Brown v. *Fletcher*, 235 U. S., 589.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.

(b) With respect to each other they held equitable estates in a tenancy in common.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 147.

II.

THE DES MOINES COMPANY WAS ORGANIZED PURSUANT TO THE EXPRESS PROVISIONS OF ARTICLE THIRD OF THE TRUST INSTRUMENT TO MAKE EFFECTIVE THE DEVELOPMENT OF THE TRUST IN CORPORATE FORM AS THEREIN AUTHORIZED, AND THE TERMINAL PROPERTIES OWNED BY THE PROPRIETARY COMPANIES WERE CONVEYED TO AND ACCEPTED BY IT FOR THIS PURPOSE.

This is established by the following facts:

(a) At the meeting of the incorporators of the Des Moines Company it was resolved:

"That for the purposes of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2nd day of January, 1882, made and en-

tered into between the Des Moines and St. Louis Railway Company and others (which is set out in full in the following Articles of Incorporation), that the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company, to wit:"

Thereafter follow the Articles of Incorporation of the Des Moines Company, including within them the contract of January 2, 1882. (Rec., 416.)

(b) The Articles of Incorporation provide that "all the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." (Rec., 420.)

(c) At meetings of stockholders held January 1, 1885, of each of the Railroad Companies, party to the contract of January 2, 1882, it was duly resolved that such company accept and ratify the Articles of Incorporation of the Des Moines Company "as in substantial accord and compliance with the terms and conditions of the contract of January 2, 1882," and "undertake to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company," and that, in pursuance thereof, upon the issuance to it of the *bonds and stock* of said company to which it may be entitled *under said contract*, its proper officers be authorized to "convey, assign and transfer" to said Des Moines Company the properties "held, enjoyed or claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof, purchased, acquired or held in pursuance of said contract." (Rec., 423-428.)

At meetings of stockholders held November 5 and 8, 1887, of each of said companies, it was further resolved that, whereas, under said contract of January 2, 1882, it was *intended* that the properties standing in the name of trustees should be transferred to the Des Moines Company *under certain conditions*, said trustees be requested to transfer to the Des Moines Company said properties upon receiving from it, in mortgage bonds of the Des Moines Company, the amount of money advanced for the

payment of its aliquot share of the capital stock thereof, said bonds and stock to be transferred to the proprietary company in lieu for the money advanced by said company to make the purchases, etc. (Rec., 435-442.)

(d) The Des Moines Company, by resolution of its board of directors, adopted January 1, 1885, reciting that, whereas, the Railroad Companies, parties to the contract of January 2, 1882, have notified the Des Moines Company that they severally approve of the organization of the Des Moines Company and have directed their officers, agents and trustees to surrender and deliver to such company the "railroad properties and franchises mentioned in said contract, and have requested it to take possession of, and maintain and operate the same for the purposes and on the terms mentioned in said contract and that said railway companies and individual signatories have indicated their desire and purpose to transfer said property to this company, *in accordance with the terms of said contract,*" duly resolved that said Des Moines Company "accepts the transfer and management and operation of said properties • • • and assumes control thereof from this date, so far as practicable, and it hereby instructs its president to make such order as may be necessary to render such control and management effective *as provided in said contract.*" (Rec., 432.)

It further resolved that its officers be appointed a committee to confer with the several parties to said contract and "agree with them severally upon the terms and price at which they will respectively assign, transfer and convey said railroad property and franchises to this company and procure from them, and each of them, such conveyance and transfers as may be necessary to fully invest this company with *the* TITLE, *control and management of said properties provided for in said contract of January* 2, 1882." (Rec., 433.)

(e) Each Railroad Company, party to the contract of January 2, 1882, served notice upon the Des Moines Company of its resolution, as above set forth, requesting the transfer to the Des Moines Company *under certain conditions* of the properties thereto-

fore acquired subject to the terms of the contract of January 2, 1882; and the individual holders of said property thereupon made deeds of conveyance to the Des Moines Company reciting that for "convenience the legal title to said property was conveyed to me in trust" and that "said property was acquired and held for the purpose and upon the terms set forth in a certain contract made and entered into on or about the 2nd day of January, 1882," and that by the resolutions above set forth "it was intended that said property * * * should be transferred to the Des Moines Union Railway Company *under certain conditions*," and the Railroad holders of certain of said properties executed and delivered their several quit-claim deeds for a like purpose. (Rec., 432-442, 446, 455-457.)

III.

THE PROPRIETARY COMPANIES HAD NO CORPORATE POWER TO ALIENATE THEIR EQUITABLE ESTATES IN THE TERMINAL PROPERTIES IN THE CITY OF DES MOINES, ACQUIRED TO BE HELD AND USED BY THEM IN COMMON.

(1) The transfer of terminals to the Des Moines Company except as trustee of the proprietary companies would dismember the railway lines of the latter and cut them off from their entrance to the City of Des Moines. It is settled law that such alienation of property and franchises is *ultra vires*.

Central Transportation Company v. *Pullman Company*, 139 U. S., 28.

Northern Pacific Railway Company v. *Ely*, 197 U. S., 1.

Northern Pacific Railway Company v. *Townsend*, 190 U. S., 267.

Section 2066 of Code of Iowa of 1897.

State v. *Central Iowa Railway Company*, 71 Iowa, 410.

Connor v. *Tennessee Central Railway Company*, 109 Fed. Rep., 931.

(2) The Des Moines Company is a railway company and not a terminal company, and its railway lines are not open to use by connecting carriers as a matter of right.

Title IX, Chapter 1, page 587, Code of Iowa, 1897.

Title X, Chapter 5, page 748, Code of Iowa, 1897.

Morgan v. *Des Moines Union Railway Company*, 113 Iowa, 561.

Chicago, Milwaukee and St. Paul Railway Company v. *Iowa*, 233 U. S., 334.

Iowa v. *Chicago, Milwaukee & St. Paul Railway Company*, 152 Iowa, 317, 321.

Section 3 of Interstate Commerce Act.

(3) The transactions should receive a construction which would sustain rather than invalidate them.

Hobbs v. *McLean*, 117 U. S., 567, 576.

IV.

THE ALLOTMENT OF SHARES OF CAPITAL STOCK OF THE DES MOINES COMPANY TO THE SEVERAL PROPRIETARY COMPANIES IN THE RELATIVE PROPORTIONS OF THEIR SEVERAL PROPRIETARY INTERESTS IN THE TRUST PROPERTIES AS FIXED BY THE CONTRACT OF JANUARY 2, 1882, WAS INTENDED TO EVIDENCE AND MEASURE THEIR SEVERAL UNDIVIDED ESTATES IN THE PROPERTY SO HELD BY SUCH CORPORATE TRUSTEE.

Under the contract of January 2, 1882, it was contemplated that a corporation might act as trustee to hold title to the terminal properties for the benefit of the proprietary companies. (Rec., 412.) The proprietary companies incorporated the Des Moines Company to act as such trustee. (Rec., 416.) Its capital stock was issued to them in the several proportions of their respec-

tive estates in the trust properties and was intended to represent the same:

(1) The Articles of Incorporation provide:

The Board of Directors of the Des Moines Company was to be designated by the proprietary companies and not by the stockholders, and representation in this respect was to be based upon relative proprietary interests. (Rec., 421.)

The Board of Directors of the Des Moines Company had no power to take any corporate action, except upon consent of the three proprietary companies. (Rec., 421.)

(2) Under the agreement of May 10, 1889, it was provided that

Shares should be issued to the proprietary companies in proportions relative to their several proprietary interests, as fixed by the contract of January 2, 1882, and in the instance of each proprietary company the shares so allotted to it should be evidenced by a single certificate expressing upon its face that the same should not be transferable in whole or in part without the consent in writing of all the proprietary companies. (Section twenty-six, Rec., 486.)

The St. Louis Company as the owner of one-half of the capital stock of the Des Moines Company might sell and transfer one-half (no more and no less) or one-quarter of the whole to such railway company as may be acceptable to a majority of the proprietary companies, *in which case it was agreed that such railway company may become the purchaser of said stock and may be admitted as one of the proprietors.* Only as aforesaid should other railroad companies be admitted *to the use of* the property of the Des Moines Company without the consent *of all* the proprietors. (Section twenty-four, Rec., 485.)

Thus an ownership by a railroad company of an aliquot share of capital stock acquired pursuant to the terms of Sections twenty-four and twenty-six

carried with it a right of user equivalent to a tenancy in common.

(3) Under the Amended Articles of Incorporation of the Des Moines Company, it was provided that its shares should be allotted to the proprietary companies in the relative amounts of their respective proprietary interests as fixed by the contract of January 2, 1882. (Rec., 491.)

In contemplation of the segregation of proprietary interests into *eighths* instead of *quarters*, it was further provided therein that "at all future elections it shall require the votes of more than seven-eighths of all the stock theretofore issued to elect any director," and that in all matters except the ordinary operation of the property "the Board of Directors can act only upon the *unanimous vote of the eight members thereof.*" (Rec., 491, 492.)

(4) The transactions between Hubbell and the purchasing committee of the Wabash Company, whereby Hubbell and Dodge acquired certain stock interests in the Des Moines Company subsequently transferred by them to a proprietary company were had with the express understanding that an ownership in a railroad company of an aliquot amount of the capital stock of the Des Moines Company would represent a proprietorship in such company. (Rec., 1603.)

V.

"THE SERIES OF ACTS AND CIRCUMSTANCES" THROUGH WHICH, IN THE MAJORITY OPINION OF THE COURT OF APPEALS, THE PROPRIETARY COMPANIES ARE SUPPOSED TO HAVE "GRADUALLY LET SLIP FROM THEM THE EXCLUSIVE OWNERSHIP AND CONTROL WHICH THEY HAD AT THE BEGINNING SO MUCH VALUED AND SO CAREFULLY GUARDED" WERE ALL IN HARMONY AND CONSISTENT WITH THE CONTINUED EXISTENCE OF THEIR RESPECTIVE PROPRIETARY INTERESTS.

THESE ACTS AND CIRCUMSTANCES ARE TO BE INTERPRETED IN THE LIGHT OF THE FOLLOWING PRINCIPLE, NAMELY, THE EQUITABLE INTEREST THAT EACH OF THE RAILWAY COMPANIES, PARTY TO THE CONTRACT OF JANUARY 2, 1882, ACQUIRED IN THE TERMINAL PROPERTIES OF THE DES MOINES COMPANY WAS MORE THAN A RIGHT IN PERSONAM OR CHOSE IN ACTION—IT WAS A RIGHT IN REM, NAMELY, AN ESTATE IN PROPERTY VESTED IN THIS RESPECT TO THE SAME EXTENT AS THOUGH THE LEGAL TITLE THERETO HAD BEEN CONVEYED TO SUCH COMPANY.

Brown v. *Fletcher*, 235 U. S., 589.

Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.

(1) The Articles of Incorporation of the Des Moines Company, adopted December 10, 1884, are based upon the premise that the Des Moines Company was organized for the sole purpose of making effective the trust created by the contract of January 2, 1882.

The resolution of the incorporators of the Des Moines Company, adopting its articles, recites that such company is organized for the purpose of making effective the trust created by the contract of January 2, 1882, and said contract is embodied in said articles as part of the organic law of the Des Moines Company. (Rec., 416.)

(2) In respect of the terminal properties, it was provided by the contract of January 2, 1882, that *"the title to said property shall be and remain in a trustee to be named by agreement of said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described," and that "said trustee," upon receiving quitclaim and conveyance to it*

of the trust properties should issue bonds secured by a mortgage upon the same to "reimburse" the temporary trustees for advances made by them or their beneficiaries in acquiring such properties. (Rec., 412.)

The conveyances made by the temporary trustees to the Des Moines Company, the making of its mortgage of November 1, 1887, and the delivery by it of its bonds secured thereby to the temporary trustees and their beneficiaries, as "reimbursement" for advances made in acquiring the trust properties, were transactions all had in compliance with the trust instrument of January 2, 1882.

(3) After the concentration of the trust properties in the Des Moines Company, no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to the Des Moines Company, its equitable estate therein.

(4) The resolution of the stockholders of the Des Moines Company of March 31, 1888, providing for the making of a supplemental agreement fixing the terms and conditions upon which the proprietary companies should enjoy the use of the terminal properties, and the agreement of May 10, 1889, made pursuant to such resolution between the Des Moines Company and the three proprietary companies are based upon and presuppose the continuing existence of the contract of January 2, 1882, and of the trusts created thereby. (Rec., 476, 479.)

Said supplemental agreement of May 10, 1889, provided in substance for (a) a regulation in detail among the proprietary companies of the use of their common tenancy, (b) a defining of terms for distributing among the proprietors the cost of maintenance, operation thereof and interest on bonds, and (c) a fixing of the manner in which the several equitable estates in the trust property should be represented and regulated through the issue of the shares of the corporate trustee. (Rec., 479.)

(5) The amendments to the articles of the Des Moines Company were illegally adopted, but, without respect to their legality, they did not purport to and could not alter or destroy the equitable estates in common of the proprietary companies in the terminal properties.

VI.

TO GIVE THE ACTS AND CIRCUMSTANCES HEREINBEFORE ENUMERATED A CONSTRUCTION OR ASPECT IN DEROGATION OF THE EQUITABLE ESTATES IN COMMON OF THE PROPRIETARY COMPANIES PURSUANT TO THE CHARACTERIZATION THEREOF OF THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS WOULD BE TO PERMIT TRUSTEES OR FIDUCIARIES NOT ONLY TO REPUDIATE THE RIGHTS OF THEIR CESTUIS QUE TRUSTENT, BUT TO ACQUIRE FOR THEMSELVES THE BENEFICIAL INTERESTS IN THE TRUST ESTATES.

(1) The Circuit Court of Appeals in its majority opinion holds that a trust was created under the terms of the contract of January 2, 1882; that the beneficiaries thereunder, the proprietary companies, at all times intended the continuance of such trust, but that the same through acts of inadvertence of the beneficiaries "apparently harmless" was destroyed, and that the Des Moines Company became an independent corporation holding the trust properties free from the terms of the trust and under the control of the Hubbells.

A trustee is not permitted to assert in his own behalf any right or interest in trust properties resulting from the inadvertence of his beneficiaries.

Bigelow on Estoppel, 6th Ed., page 589.

(2) As an officer, director and agent of the Des Moines Company, Hubbell was bound by the terms of the trust.

(3) The consolidated company, a successor in interest to the properties acquired to be held and used in common, of which Hubbell was also an officer and director, and the controlling stockholder, was subject to the disabilities of a fiduciary; for cotenants occupy to each other the position of express trustees in respect of the property held in common.

Rothwell v. *Dewees*, 2 Black, 613, at 618.
Bissell v. *Foss*, 114 U. S., 252, at 259.
Turner v. *Sawyer*, 150 U. S., 578, at 586.
Starkweather v. *Jenner*, 216 U. S., 524, at 528.

Therefore, Hubbell, as a successor to the consolidated company in ownership of a portion of the stock in the Des Moines Company, by a transaction in which he was virtually both seller and buyer, was a fiduciary in respect of the trust properties, for he could have rights no greater than those of his controlled vendor.

VII.

THE FIVE-EIGHTHS STOCK INTEREST IN THE DES MOINES COMPANY HAVING BEEN ACQUIRED BY THE HUBBELLS FROM THE CONSOLIDATED COMPANY OF WHICH THEY WERE DOMINATING STOCKHOLDERS AND DIRECTORS IN VIOLATION OF THEIR FIDUCIARY OBLIGATIONS TO THE PROPRIETARY COMPANIES, THE DECREE HEREIN, IN ADDITION TO THE PRIMARY RELIEF ASKED, QUIETING THE EQUITABLE TITLES OF THE COMPLAINANTS IN THE TRUST PROPERTIES SHOULD ALSO PROVIDE FOR A RESCISSION OF THE STOCK TRANSACTION AND FOR A REDEMPTION OF THE SHARES BY THE COMPLAINANTS ON EQUITABLE TERMS.

(1) The transaction was intrinsically a fraud.

(2) The stock having been acquired by the Hubbells for the purpose of destroying the trust, the transaction is voidable by the beneficiaries thereof.

Rothwell v. *Dewees*, 2 Black, 613, at 618.

VIII.

NO FACTS APPEAR IN THE RECORD CONSTITUTING AN ESTOPPEL OR LACHES DEFEATING THE EQUITY OF THE COMPLAINANTS.

(1) It is essential to the application of the doctrine of estoppel that a party asserting it must have been misled to his prejudice.

Braut v. *Virginia Coal & Iron Company et al.*, 93 U. S., 326.

Bigelow on Estoppel, 6th Ed., page 476.

Herman on Estoppel, page 797.

Chicago, Milwaukee & St. Paul Railway Company v. *Des Moines Union Railway Company and others*, 165 Iowa, 35.

(2) Laches can never be asserted, upon an equivocal state of facts.

Speidel v. *Henrici*, 120 U. S., 377.

IX.

THE SURPLUS EARNINGS WERE PROPERLY AWARDED TO THE COMPLAINANTS BY THE UNANIMOUS DECISION OF THE CIRCUIT COURT OF APPEALS.

(1) The surplus earnings are apportionable to the proprietary companies under Section Four of the supplemental agreement of May 10, 1889, as construed by the parties themselves.

Topliff v. *Topliff*, 122 U. S., 121, 131.

(2) The surplus earnings were determined to belong to the proprietary companies by formal action of the directors of the Des Moines Company, including the Hubbells, and such adjustment is binding upon the Des Moines Company.

Central Trust Company v. *Wabash, St. Louis and Pacific Railway Company*, 34 Fed. Rep., 254.

ARGUMENT.

I.

BY THE TERMS OF THE CONTRACT OF JANUARY 2, 1882, THE ST. LOUIS COMPANY, THE NORTHWESTERN COMPANY AND THE NORTHERN COMPANY, PREDECESSORS OF THE COMPLAINANTS, ESTABLISHED FOR THEIR JOINT AND SEVERAL BENEFIT AN EXPRESS TRUST IN CERTAIN RAILROAD PROPERTIES THERETOFORE ACQUIRED IN THEIR COMMON INTEREST.

It is the claim of the complainants in this case that the Des Moines Company holds title to the terminal railway properties at Des Moines in trust for their joint use and occupation. This claim has its foundation in the contract of January 2, 1882, made between the "St. Louis Company," the "Northwestern Company" and the "Northern Company," James F. How, James F. How, trustee, and Grenville M. Dodge.

To appreciate fully what was then done and what was intended to be secured thereby, this contract should be read in the light of those events and transactions which are set forth in Subdivision I of the statement of facts, which were preliminary to the establishment of the trust, and were the inducements for the same. From these facts it appears that Hubbell and his partner Polk, were the promoters, and that the Wabash, St. Louis & Pacific Railway Company, predecessor of the Wabash Company, was the financial sponsor of the enterprise, having as its object the construction and ownership of terminals at Des Moines to the end that the railroads which eventually became the Northwestern and the Northern Companies, lying as the arms of a Y, to the northwest and north of Des Moines, should be connected with the railroad which eventually became the St. Louis

Company, the stem of the Y, lying to the south of Des Moines through the terminal properties to be owned in common interest at Des Moines.

At the inception of this enterprise none of these three companies extended into the City of Des Moines, and the Wabash Company undertook also to finance the construction work to extend the respective lines for this purpose. Polk and Hubbell were the local people at Des Moines promoting all these activities. They, with others, incorporated the St. Louis Company for the purpose of constructing the extension from Albia to Des Moines on the south. They also reincorporated the Northwestern Company for the purpose of completing the left arm of the Y from Des Moines northwest to Fonda, to connect with and become a part of the railroad theretofore promoted by Hubbell. They also incorporated the Northern Company for constructing the third line along the right arm of the Y from Des Moines to Boone.

All this was done pursuant to written agreements, among these an agreement made December 8, 1880, between Hubbell, Polk, Clarkson and Runnells of the one part, owning and controlling the capital stock of the Narrow Gauge Railway Construction Company, and the Wabash Company on the other part. The first parties were to give their time, personal attention to and act as directors and officers of the enterprise. They were personally to exert themselves to procure subsidies in aid of the line and donations of lands, rights of way and other benefits in aid of construction.

The construction work of the three lines, as well as the assembling of the necessary terminal railways and facilities at Des Moines proceeded actively in 1881, and the operations were conducted from the office of Polk and Hubbell. Hubbell negotiated the purchase of real estate

for the terminal properties at Des Moines, and the funds therefor were advanced by the Wabash Company and by Gen. Grenville M. Dodge. Four parties acquired this real estate to be used for the common purpose. The St. Louis Company and the Northern Company acquired certain property largely obtained through condemnation proceedings. James F. How and Grenville M. Dodge took title to the remainder of the properties, Dodge paying for certain of the properties that were credited to the Northern Company.

At the close of the year 1881, the road of the Northwestern Company was open for operation, and its trains were running into the Des Moines terminals, and the two other roads were well advanced.

Thus, at this point, the following situation had developed:

The legal title to certain of the properties was in the Northern Company, which it had acquired by condemnation proceedings; the legal title to the certain other property was in the St. Louis Company, which it had also acquired by condemnation proceedings; the remaining property was in the title of certain individuals, namely, Dodge and How, without specification of the terms of the trust, but the beneficiaries of the trust were the three railway companies, by or on whose behalf all of the above referred to properties had been acquired, and which had provided the money for the acquisition thereof. It therefore appeared that operation had already begun on the terminal properties before any definite plan for the permanent holding of the properties for railroad purposes had been determined upon by the beneficiaries of the trust.

The above situation prompted the making of the contract of January 2, 1882 (Rec., 411), which lies at the foundation of the rights of the parties to this suit.

The three railroad companies and the two individuals above named joined in making it, and the Wabash Company subjoined a consent to the execution of the contract by the St. Louis and Northwestern Companies. The first five paragraphs of the contract are the substructure of this controversy. They are very simple and very clear in their terms. We quote them here in full:

"First.

The Companies above named are engaged in the construction of railways converging at the City of Des Moines and have heretofore agreed upon the purchase, construction and maintenance, at their joint expense for terminal facilities in the City of Des Moines *to be held and used in common* as hereinafter provided.

Second.

In pursuance of said agreement, various purchases have been made of real property in the City of Des Moines in the name of James F. How, individually, James F. How, Trustee, and Grenville M. Dodge, and certain additional property has been appropriated by the Des Moines and St. Louis Railway Company, and the construction of buildings and other improvements upon said premises has been begun.

Third.

It is mutually agreed by the parties above named, that the expense incurred by the purchases and improvements above mentioned and such others as may be hereafter made, shall be borne in the proportion of one-half by the Des Moines and St. Louis Railway Company and one-quarter by each of the other two Companies above named. It is understood that a Depot Company may be organized and may take permanent charge of the property upon the terms herein set forth and that said Company may issue and deliver to the Companies, parties hereto, its mortgage bonds to the amount of their respective portions of the cost of the said purchases and improvements.

Fourth.

The title to said property shall be and remain in a trustee to be named by agreement of said Companies but subject to the joint use and occupation of all of said Railway Companies upon the terms herein described.

Fifth.

The individual signers hereto hereby declare said purchases to have been made in their names upon the trusts above referred to, and agree to quit claim and convey the same to said trustee upon demand and reimbursement." (Rec., 412, 413.)

From the above certain things are obvious.

(a) The Railroad Companies, parties to the agreement, had theretofore agreed that the terminal facilities, being then acquired at Des Moines, should be held and used in common by them, and that this contract of January 2, 1882, should provide the basis for this common tenancy.

(b) The common properties were held in severalty by four parties: two corporate and two individual. It was apparent that tenure for railroad purposes could not continue in this form and that, therefore, these several trustees must convey to a common trustee.

(c) It was therefore agreed that title was *to be and remain in a trustee, but subject to the joint use and occupation of all of said Railroad Companies upon the terms defined in the agreement.*

(d) The individual signers declared that the purchases made in their names were taken in trust and they agreed to quitclaim and convey the same to this single trustee *upon demand and reimbursement.*

(e) It was agreed that the contemplated trustee might be a Depot Company, to be organized to take

permanent charge of the property upon the terms set forth in the contract, and that said company might issue and deliver its mortgage bonds to the three constituent companies to the amount of their respective portions of the cost of said purchases and improvements.

It is very clear from the foregoing that the parties intended to vest in the three Railroad Companies a common proprietorship in the terminal properties acquired in their common interest, and it is also very clear that the parties intended to finance the properties so to be owned by them by an issue of bonds secured upon their common title.

Note particularly in this respect, that the temporary holders in trust of the properties are to convey and quit claim to a *trustee* (not to a vendee), only upon demand and reimbursement.

Note further in this respect that the expenses incurred by purchases and improvements are to be borne in the proportion of one-half by the St. Louis Company and one-quarter by each of the other two companies, and that the Depot Company, to be organized for the purpose of taking charge of the property, is to issue and deliver its mortgage bonds to the above companies to the amount of their respective portions of cost of the said purchases and improvements.

It follows beyond question that the title of the Depot Company in the terminal properties was to be of the character that would permit it to mortgage them to secure such bond issue, and that in this respect it must necessarily have been intended to act as a trustee agent, mortgaging the beneficial interests or the equitable estates of the three proprietary companies in their common tenancy; for the individual title holders were to convey the properties, for which they were to be reim-

bursed through these bonds, only to a *trustee* and not to a vendee.

The scheme of reimbursement thus contemplated was identical with that in common use among railroad companies, namely, the mortgaging of properties bought with current funds for the purpose of reimbursing the railroad treasury to the end that the railroad investment might be transferred to a permanent capital obligation. If the three proprietary companies had taken legal title as tenants in common, instead of equitable titles in this respect, they would have reimbursed themselves with a bond issue in identically the same manner.

The majority opinion of the Court of Appeals, has properly described the effect of the above contract as follows:

> "As to the Companies, the contract not only declared some existing property rights, but attempted to define for the future the rights of title and usage of the terminal property. The title contemplated was a trust. The legal title to be 'in a trustee to be named by agreement of said companies.' The *beneficial estate* (italics ours) to be in the three companies in proportion to the parts each contributed to the payment therefor." (Rec., 2096.)

This Court has stated in the case of *Brown* v. *Fletcher*, 235 U. S., 589, that the equitable interest of a *cestui que trust is* more than a chose in action or a right *in personam*. It says that

> "the modern cases do not treat the relation between trustee and *cestui que trust* as contractual."

The interest of the *cestui* is *in rem*. It is an estate in property to the same extent as if the property was in his possession and it passes by deed. In such case an instrument of alienation is not an assignment of a chose in action. It is a deed, or if not called a deed, "an evidence of the assignee's right, title and estate in and to property."

As stated in Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975:

> "In fact, the entire dealing of equity with the subject of equitable estates, and the fundamental distinctions between equitable and legal conceptions and modes are based upon the notion that equitable estates are in the truest sense property, and not mere rights to obtain certain equitable remedies."

In analyzing the subsequent transactions of the parties, this principle is important in determining their significance and effect.

It is to be noted that the ownership and control of property rights of this character, is *that* which the majority opinion of the Court of Appeals states was never intended to be released by the proprietary companies, and yet that Court says that through their acts of inadvertence, they have "gradually let slip from them that exclusive ownership and control which they had at the beginning so much valued and so carefully guarded." It is also to be noted, that the title to such property has thus gradually faded away to the advantage and interest of their own creature, the trustee, created by them with the sole object of conserving in each of them its equitable estate in common therein.

When an estate in trust is once solemnly created, transactions thereafter had between the trustee and his beneficiary will be presumed to be in harmony with and in furtherance of the trust estate so set up, for as is said in *Brown* v. *Fletcher,* above referred to, "the relation between the trustee and the *cestui que* trust is not contractual."

They are indeed one

> "and a proceeding by the beneficiary or his assignee for the enforcement of rights in and to the property, held—not in opposition to but—for the benefit of the beneficiary, could not be treated as a suit on a

contract, or as a suit for the recovery of the contents of a chose in action, or as a suit on a chose in action." (p. 599.)

It follows that if, after making the trust instrument of January 2, 1882, the record had shown merely the organization of a railroad corporation by the three proprietary companies, warranty deeds of conveyance by the temporary trustees of the terminal properties to such corporation, and the issuing of mortgage bonds by such corporation in amounts sufficient to reimburse the grantors for such warranties of conveyance, all these acts would be *presumed* to have been done in furtherance of the trusts established by the contract of January 2, 1882.

It will appear, however, that in the corporate and intercorporate procedure had subsequent to the making of this contract, the parties to the same, with painstaking repetition of expression, contained in resolution, articles of incorporation and deed, took every step possible to continue the existence of the equitable tenancy in common set up among them in the terminal properties at Des Moines.

II.

THE DES MOINES COMPANY WAS ORGANIZED PURSUANT TO THE EXPRESS PROVISIONS OF ARTICLE THIRD OF THE TRUST INSTRUMENT, TO MAKE EFFECTIVE THE DEVELOPMENT OF THE TRUST IN CORPORATE FORM, AS THEREIN AUTHORIZED, AND THE TERMINAL PROPERTIES OWNED BY THE PROPRIETARY COMPANIES WERE CONVEYED TO AND ACCEPTED BY IT FOR THIS PURPOSE.

At the first meeting of incorporators of the Des Moines Company, held at Des Moines, December 10, 1884, the proceedings state that the meeting was held for the purpose of organizing a Union Depot and Railroad Company,

to be run and operated in and around the City of Des Moines, Iowa, *in pursuance of the contract of January* 2, 1882. (Rec., 416.)

There were present at this meeting, Grenville M. Dodge, who appeared for himself and in the interest of the Northern Company; Polk and Hubbell, who appeared for the Northwestern Company; Runnells and Meek, who appeared for the St. Louis Company, and How, appearing as trustee and in his individual capacity. It was resolved:

> "That for the purpose of carrying out the objects and purposes of the agreement heretofore, to wit, on the 2nd day of January, 1882, made and entered into between the Des Moines and St. Louis Railroad Company and others, (which is set out in full in the following articles of corporation) that the following be adopted as the Articles of Incorporation of the Des Moines Union Railway Company."

The articles begin with a recital that the St. Louis Company, the Northwestern Company and the Northern Company and Dodge and How have purchased properties upon certain agreed conditions at their joint expense in accordance with the contract of January 2, 1882.

Thereafter said contract is set out in full in said articles.

It is then recited that it was provided in said contract that a Depot Company might be organized to take permanent charge of the property, and that it was understood that the Company might acquire, operate and maintain said property in such manner as best to serve the interest of the parties.

In Article 2, it is stated that the object of the Company shall be to construct, own and operate a railway in and about the City of Des Moines, and that "*all the powers exercised by this company shall be in accord-*

ance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882." (Rec., 420.)

It is to be noted that the articles provide that the affairs of the company shall be managed by a board of eight directors, four of whom shall be nominated by the Wabash Company and two by the Northwestern Company and two by the Northern Company; that no contract, lease or agreement, amounting to a permanent charge upon the properties of the Depot Company, shall be entered into by the board without having the approval of the three proprietary companies. (Rec., 421.)

Thereafter, on January 1, 1885, the three proprietary companies passed identical resolutions, accepting and ratifying the articles as in substantial accord and compliance with the terms and conditions of the January 2, 1882 contract, and requesting the temporary individual trustees to convey the properties held by them under the terms of the January 2, 1882, contract, to the Des Moines Company. (Rec., 423, 424, 429.)

On the same day the Des Moines Company adopted a resolution reciting that it had been notified by the proprietary companies that each had approved its organization and had directed its officers and trustees to deliver to the Des Moines Company the railroad properties and franchises mentioned in the contract of January 2, 1882, *and had requested the Des Moines Company to take possession of and maintain and operate the same for the purposes and on the terms mentioned in the January 2, 1882 contract.* It was therefore resolved that the Des Moines Company accept the transfer and management and operation and assume control thereof, so far as practicable, and instruct its officers to make such order as may be necessary to render *such*

control and management effective as provided in said contract, and its officers were appointed as a committee to confer with the parties to the January 2, 1882, contract, to agree upon the terms and price at which they would respectively convey such property and franchise to the Des Moines Company *and to procure from them and each of them such conveyances and transfers as might be necessary to fully invest the Des Moines Company with* THE TITLE, *control and management of such properties provided for in the January* 2, 1882 *contract.* (Rec., 432, 433.)

Hubbell, as a member of the board of the Des Moines Company, voted in favor of these resolutions, and as secretary of that company acted as secretary of the meeting. (Rec., 435.)

Owing to the receivership of the Wabash, St. Louis and Pacific Railway Company and the consequent insolvency of the Northwestern Company, for whose benefit the Wabash Company had advanced funds, and the consequent inability of the parties to the terminal enterprise to arrange for the assignment to the Northwestern Company of its one-quarter estate in the trust properties, no further action was taken to vest in the Des Moines Company title to the properties that it was to hold in trust, until November 5 and 8, 1887, when each of the proprietary companies passed resolutions reciting that the temporary trustees had taken title to certain properties, which were to be transferred to the Des Moines Company *under certain conditions*, and requesting that these temporary trustees convey the properties held by them to the Des Moines Company, for the purpose of carrying out the contract of January 2, 1882. (Rec., 435, 437, 442.)

In the instance of the St. Louis Company and the

Northwestern Company, with respect to the properties to which each took title for the common enterprise, they directed their own officers to make conveyance of the same to the Des Moines Company *for the purpose of carrying out the contract dated January* 2, 1882. (Rec., 436, 438, 439, 442, 443.)

On November 8, 1887, the three companies served notice upon the Des Moines Company that they had passed these resolutions. (Rec., 439, 441, 442.) On the same day the board of directors of the Des Moines Company adopted a resolution directing its officers, upon receiving conveyance of the properties in question, to deliver bonds to How and Dodge for the amount of money which will be shown by them to have been expended for, or on the property referred to, and that certificates for one-quarter of the stock be issued to the St. Louis Company and three-quarters of the stock be issued to the purchasing committee of the Wabash Company. (Rec., 1300.)

Pursuant to the foregoing, the St. Louis Company conveyed the properties held by it for the enterprise to the Des Moines Company (Rec., 457), *and Frederick M. Hubbell, who signed this deed of conveyance as secretary, testified that it was made pursuant to the resolution that such conveyance should be made to the Des Moines Company for the purpose of carrying out the contract of January* 2, 1882. (Rec., 1115.) The Northern Company conveyed its interest by quitclaim deed. How and Dodge made two deeds of conveyance. The How deeds recited that the property was acquired and held by him in trust and was conveyed *for the purpose and upon the terms set forth in the contract of January* 2, 1882. (Rec., 446, 448, 451.)

For the purpose of mortgaging the trust properties, to reimburse the proprietary companies for the ex-

penses incurred by them in acquiring the terminal properties as provided by Article Third of the contract of January 2, 1882, the Des Moines Company made its certain mortgage dated November 1, 1887, to secure an issue of bonds amounting to $800,000. (Rec., 474, 475.)

The conveyances above recited, the execution of the mortgage of the Des Moines Company and the issuance of its bonds thereunder were all "approved, ratified and confirmed" in their original significance by virtue of Article 14 of the amended articles of the Des Moines Company, adopted at a meeting of its stockholders on April 8, 1890. (Rec., 494.)

The foregoing facts speak for themselves.

They show that with painstaking effort in corporate action, all the parties in interest strove to make an effective conveyance of the legal titles acquired in their common interest to the Des Moines Company to the end that their equitable and common estates therein should continue, to be availed of thereafter, for the purposes of their joint use and occupation of the terminal properties.

The status thus reached in the affairs of the proprietary companies was never thereafter altered by any act which resulted in the defeasance or alienation of the estates thus created.

In this respect, the following is to be noted:

(1) That a right of possession adverse to the user incident to the equitable estates of the proprietary companies never arose in favor of the Des Moines Company, even if it could be assumed that the Des Moines Company, in its capacity as trustee, could acquire a right by adverse user; for from the inception of the enterprise and during the period in which the four temporary trustees held title to the terminal property; during also the period after the conveyance of the same to the Des Moines Com-

pany, the permanent trustee, namely, from 1888, up to the making of the supplemental agreement of May 10, 1889; and since the making of said last named agreement to the present time, the three proprietary companies have been in constant use and possession of the premises operated by the Des Moines Company, thus asserting through several distinct periods and varieties of legal tenure, a continuing proprietorship therein.

(2) No instrument of any kind or character was ever executed by any proprietary company, or by any of its successors, releasing or conveying to the Des Moines Company its estate in the common property.

(3) Estates in property do not pass by acts of inadvertence to parties who are not innocent purchasers for value, and particularly in this respect to those holding a fiduciary relationship to the alleged grantors.

(4) The privity of relationship in respect of the controversy here involved is between the proprietary companies and their trustee. Therefore the transactions by which Hubbell acquired his stock in the first instance from the purchasing committee of the Wabash Company, even if admitted to be anomalous (an admission denied) could not alienate or release the trust estates set up by the proprietary companies, or relieve the Des Moines Company from its duties as a trustee or create an estoppel in its favor in this respect. They could not create an estoppel in favor of Hubbell, for the nature of interest, which an individual holding stock in the Des Moines Company (assuming his title in the same) could have in the trust properties, is not on trial here.

III.

THE PROPRIETARY COMPANIES HAD NO CORPORATE POWER TO ALIENATE THEIR EQUITABLE ESTATES IN THE TERMINAL PROPERTIES IN THE CITY OF DES MOINES ACQUIRED TO BE HELD AND USED BY THEM IN COMMON.

One of the necessary objects of the proprietary companies in acquiring properties at Des Moines, upon which to construct and operate terminals, was to serve the public. The Railway Companies could exercise their powers of condemnation, by which a portion of the properties were acquired, only upon this theory. Moreover, with this same idea in view, three townships of Boone County, Iowa, voted and paid over to the Northern Company $61,337.72, for the purpose of aiding the Northern Company in constructing its railway from Boone to a connection with the line of the Wabash Company, and each township by ordinance provided that the tax for raising this money be due and payable when the railroad connection to be so required shall have been completed and cars running thereon. These conditions were accepted in writing. (Rec., 789-797.) Green County voted taxes amounting to $27,732.49 and Calhoun County likewise voted $19,587.28 to the Northwestern Company for a similar purpose. (Rec., 797-820.)

On March 22, 1881, the City of Des Moines passed an ordinance granting a right of way to the St. Louis Company over, across and along certain streets in said city, upon which eventually became located the main lines of railroad of the Des Moines Company. This grant was made upon the condition that the Railroad Company locate and build passenger stations in East and West Des Moines, and that cars should be running into the city by the first day of January, 1882. By express provision,

the ordinance was to operate as a contract between the City of Des Moines and the St. Louis Company, upon acceptance of the same by the latter. (Rec., 443-445.)

Thus the proprietary companies having accepted public funds for the purpose of uniting their properties through the ownership of a common terminal, having exercised the sovereign right of condemning private property for this purpose, and having received a charter from the state to enable them to operate as an entity the terminal properties so acquired by them, it was beyond their power to put themselves in a position with respect to this railroad company and to the properties to which it took title in trust for their use and occupation, whereby they would be unable to serve the public.

In view of this principle, not only every presumption will be indulged to interpret their acts as intending to keep intact the joint control acquired over the terminal properties by virtue of their ownership in the same, but it should also be held that if attempt were made by them to part with this control their acts for such purpose should be regarded as ineffectual.

The contentions of the defendants in this case run counter to the above principle.

It is asserted by them that the proprietary companies deliberately abandoned their trust estates by selling properties, acquired by them for the purpose of making connections between their respective railroads, to an independent railroad company and deliberately became minority stockholders in such company, thus making imminent a situation now claimed by the defendants to have arisen, namely, a status of being strangers to properties which they had appropriated and otherwise obtained by sovereign prerogative for a public trust.

That it was not within their power to abandon title to railroad properties so acquired is the settled law of the land.

This Court has repeatedly decided that a railway corporation cannot alienate or turn over to another railroad corporation its railroad in whole or in part without the express consent of the state, under whose franchise the railroad was constructed or acquired.

Central Transportation Company v. *Pullman Company*, 139 U. S., 28.

Mr. Justice Gray, who wrote the opinion in this case, reviewed the law on this subject and stated the above principle as the "clear result" of the decided cases.

This Court by subsequent decisions has reaffirmed and followed the opinion of Mr. Justice Gray, and in applying the principle asserted therein, it has repeatedly held that railway properties dedicated to public use cannot be lost by adverse possession.

Northern Pacific Railway Company v. *Ely*, 197 U. S., 1.

Northern Pacific Railway Company v. *Townsend*, 190 U. S., 267.

Section 1300 of the Iowa Code of 1873, which is the same as Section 2066 of the Iowa Code of 1897, is as follows:

"SALE OR LEASE OF RAILROAD PROPERTY—JOINT ARRANGEMENT. Any railway corporation may sell or lease its property and franchises to, or make joint running arrangements not in conflict with law, with any corporation owning or operating any connecting railway, and any corporation operating the railway of another shall be liable in the same manner and extent as though such railway belonged to it."

It will be seen from the provisions of this statute that if it be desired to sell or transfer railroad property, the entire railroad together with its franchises—and not a part—must be sold or transferred. The Iowa statute does not permit a railroad to be dismembered, or the franchises under which it was constructed to be disrupted. The railroad and franchises are a unit, and are required to be held and used as a unit, and when transferred must be transferred as a unit. *State* v. *Central Iowa Ry. Co.*, 71 Iowa, 410. That a part of a railway system cannot be separated from its franchises is clearly shown in the opinion of Mr. Justice Lurton in *Connor* v. *Tennessee Central Railway Co.*, 109 Fed. Rep., 931.

The fact that the proprietary companies held their terminal properties at Des Moines in a common proprietorship makes but a distinction without a difference in the application of the above principle; since one owning a tenancy in a common estate has rights of user in all the properties of such estate (subject to like rights in its other tenants) equivalent to an exclusive proprietorship therein, and thus unity of ownership in terminals makes permanent for each carrier the means of interchange of through traffic with its associates.

If, then, it was beyond the power of the proprietary companies to convey away, or, as the District Court put it, "chop off," the most essential parts of their railways terminating in the City of Des Moines they, of course, could not by acquiescence or by a *"series of acts or circumstances,"* as the majority opinion of the Circuit Court of Appeals states, *indirectly or unintentionally, "gradually let slip from them the exclusive ownership and control which they had at the beginning so much valued and so carefully guarded."* (Rec., 2114.)

In the case of *State* v. *Central Iowa Railway Co.*, 71

Iowa, 410, the rule is announced that, where a line of railroad has been built by aid of taxes levied for that purpose, the line in aid of which the tax was voted must be operated as a whole, and a portion thereof cannot be leased or operated separately to the injury of any locality on that line. A railroad company which avails itself of such aid assumes relations to the public different from those resulting from a mere private contract.

The majority opinion seeks to avoid the application of the above principle by yielding to an adroit but insidious "concession" of the Hubbells that the Des Moines Company must furnish reasonable and necessary terminal facilities to the St. Paul and Wabash Companies upon payment therefor of such reasonable sum as may be agreed upon, or in default of such agreement *"as may be fixed by the proper public tribunal."* This conclusion rests upon the erroneous assumption that the Des Moines Company is a union railway depot company or terminal company, and as such is under legal obligation to permit the use of its tracks and terminal facilities by any railway company entering the City of Des Moines upon reasonable terms, which if not agreed upon between the parties may be fixed by some proper public tribunal.

The Des Moines Company, however, was not organized under the Statutes of Iowa as a union railway depot company, or as a terminal company, with the obligations usually charged upon such companies to serve other railroads. The statutes of the state provide for only two kinds of railroad companies, namely:

(a) Corporations for the construction and operation of railways. (Title IX, Chap. 1, page 587 *et seq.*, Code of Iowa 1897.)

(b) Corporations for the construction and main-

tenance of union railway depot companies. (Title X, Chap. 5, page 748 *et seq.*, Code of Iowa 1897.)

In the case of *Morgan* v. *Des Moines Union Railway Company*, 113 Iowa, 561, the Supreme Court of Iowa held that the Des Moines Company was organized under the former of the above statutes, namely, the general railroad incorporation law of the state, and that it therefore had rights and duties measured by this statute and not by the union railway depot act. This decision, being the construction by the highest Court of the state of a state law as applied to the status of the Des Moines Company, is conclusive here.

There is no statute of the State of Iowa which requires one railway company to give the use of its railroad tracks or terminal facilities to another railway company. The sole statute bearing on the subject is Section 2116 of the Code of Iowa, 1897, page 751, which in substance requires connecting carriers to interchange and transport empty and loaded cars. The statute was so construed in *Chicago, Milwaukee and St. Paul Ry. Co.* v. *Iowa*, 233 U. S., 334, sustaining the construction given to it by the Supreme Court of Iowa in the same case, 152 Iowa, 317, 321. Such an obligation is, of course, wholly distinct from a duty to permit one railway company to use the tracks or terminals of another.

Section 3 of the Interstate Commerce Act, in providing for the interchange of traffic between connecting carriers, makes by express provision the same distinction in the clause reading:

> "But this shall not be construed as requiring any common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

From the foregoing it follows that, if the proprietary companies have lost the equitable estates once existing

in them in the Des Moines terminals, they have no power by common law or statute to compel the Des Moines Company to give to them upon any terms the use of these terminals.

With such consequence resulting from any termination of the ownership in the Des Moines terminals originally existing in the proprietary companies, not only should their unintentional and "apparently harmless" acts never be interpreted as effecting a separation of such ownership from their other railway properties, but it should also be held that, even with design, they could not bring about such a result.

Hobbs v. *McLean*, 117 U. S., 567, 576.

IV.

THE ALLOTMENT OF SHARES OF CAPITAL STOCK OF THE DES MOINES COMPANY TO THE SEVERAL PROPRIETARY COMPANIES IN THE RELATIVE PROPORTIONS OF THEIR SEVERAL PROPRIETARY INTERESTS IN THE TRUST PROPERTIES AS FIXED BY THE CONTRACT OF JANUARY 2, 1882, WAS INTENDED TO EVIDENCE AND MEASURE THEIR SEVERAL UNDIVIDED ESTATES IN THE PROPERTY SO HELD BY SUCH CORPORATE TRUSTEE.

It is asserted by the Hubbells that the issuing of capital stock of the Des Moines Company to the proprietary companies was intended to represent in part the purchase price paid by the Des Moines Company for the conveyance to it of the beneficial interest of the proprietary companies in the Des Moines terminals, and is therefore inconsistent with the continuance of these equitable estates in the proprietary companies.

An analysis of the circumstances under which this capital stock was issued, the basis of its distribution and the limitations in its attributes and transferability will show quite a contrary intent.

To protect rights or conserve interests, a court of equity will always ignore form for substance. It is admittedly a legal fiction that regards the stockholders of a corporation as not in fact the owners of its corporate property, and when an instance arises in which it appears that shares of stock are not intended to evidence a thing of value separate and distinct from an aliquot interest or estate in the properties themselves of a corporation, a court of equity to protect such interests in corporate properties otherwise created and intended to be preserved will not hesitate to ignore the conventional status of such shares.

Judge Hook of the Court of Appeals has stated the principle clearly in his dissenting opinion in this case. He says:

> *"But the doctrine of a corporate entity separate and apart from the persons composing the corporation is after all a mere legal fiction established for convenience and to serve the ends of justice.* (Our italics.) It does not go beyond that. In equity the shell artificially assumed is not impermeable. The court will look through it and regard the kernel, and whenever justice requires will hold the stockholders as the corporation. That is being constantly done in equity in determining public rights as affected by the corporate association of particular individuals and the rights of the individuals among themselves and with respect to their organization." (Rec., 2123.)

That in this case the stock of the Des Moines Company was not intended to be issued as a substitute thing of value for the equitable estates of the proprietary companies in the terminal properties, but was intended to measure their respective aliquot shares in their equitable estate in common is evidenced by all the facts. Of this Judge Hook says:

> "After the conclusion is reached that the terminal

company had by gradual action thrown off its trust character and had become independent, attention is directed to the transactions in its stock. The power asserted by the individual defendants to control the terminal company and thereby to exclude the plaintiffs from the use of the terminals rests upon their possession of five-eighths of the issued capital stock. *There is, however, abundant proof that the stock of that company was intended only to represent the interests of railroad companies actually using the terminal facilities and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable.* I know of no public policy or rule of law against such a status of corporate stock or its enforcement as between the parties who established it. If it were formally expressed in the corporate charter the world would have to take notice. But as between the parties themselves, those participating and having actual knowledge, internal evidence may disclose it. It should always be in mind that in this case there are no innocent purchasers relying upon public records. The contract of 1882 specified the proportional interests of the three original railroad companies and foreshadowed the organization of the terminal company to take the place of an individual trustee. *In* 1884 *the terminal company was organized for the expressed purpose of carrying out the contract.* My brothers see in the articles of incorporation some evidence of a departure from the trust and the beneficial relations, but it seems to me that *the intention to maintain them was asserted and reasserted as definitely and positively as words would permit.* (Our italics.) While, as customary, the charter made provision for a capital stock, the connection between the distribution and future ownership of such thereof as might be issued and the railroad use of the property was manifested not only in that instrument but afterwards in many ways by both the railroad companies and the terminal company." (Rec., 2120.)

The Des Moines Company was incorporated Decem-

ber 10, 1884 (Rec., 416), but no certificates of stock were issued until after the attempted amendments to its articles of incorporation made at the alleged stockholders' meeting of April 8, 1890. (Rec., 488.) It is a fact, however, that the legal issuing of stock took place under the agreement of May 10, 1889 (Rec., 479), which, as will hereafter appear, was intended to regulate in detail the user and distribute the cost of operation and other expenses of the terminal properties among the proprietary companies; and which also allotted the stock of the Des Moines Company to the proprietary companies in specific amounts and defined its attributes and the limitations on its transferability. It is well settled that the issuing of certificates is not essential to make stock outstanding.

Hawley v. *Upton*, 102 U. S., 316.

Farmers Mutual Telephone Co. v. *Howell*, 122 Iowa, 22.

Article 3 of the original articles of incorporation of the Des Moines Company provided that the capital stock of the corporation should be one million dollars to be divided into shares of $100 each to be paid in at such time as the board of directors may determine, and the board was authorized to receive in payment therefor the properties and franchises held by the St. Louis Company, the Northwestern Company, the Northern Company, James F. How and Grenville M. Dodge. (Rec., 420.)

At a meeting of the stockholders of the Des Moines Company, held on November 1, 1887, Article 3 was amended by making the capital stock two million dollars and again providing that the board of directors be authorized to receive in payment therefor the properties and franchises in the City of Des Moines, held by the above mentioned parties. (Rec., 1297-8.) At this meeting the board also adopted a resolution, offered by F. M. Hubbell, authorizing the issue of $800,000 of mortgage

bonds of the company, and it is to be noted that the execution of this mortgage was ratified by the stockholders of the Northwestern Company and of the St. Louis Company at meetings held respectively on January 2 and 3, 1890. (Rec., 474, 475.)

As a matter of fact stock of the Des Moines Company was never issued, to the proprietary companies, either in form or amount, or under circumstances, which could identify its issue in any way as a substituted consideration for the supposed conveyance to the Des Moines Company of the equitable estates of the proprietary companies in the terminal properties.

Stockholders' Meeting of the Des Moines Company Held March 31, 1888.

At a stockholders' meeting of the Des Moines Company, held March 31, 1888 (Rec., 476), it was recited that, for the cost of acquiring the terminal properties, the parties are entitled to the following amounts:

Wabash Company	$382,110.80
Grenville M. Dodge	74,088.01
Polk and Hubbell	2,000.00
Northwestern Company	3,058.40

It was therefore resolved that *in settlement of* said amounts:

382 bonds be issued to the purchasing committee of the Wabash Company
74 bonds to Grenville M. Dodge
2 bonds to Polk and Hubbell
3 bonds to the Northwestern Company.

These bonds were to be those to be issued under the mortgage of the Des Moines Company, dated November 1, 1887, and authorized by the resolution of the stockholders of the same date above referred to, and in due course the bonds above authorized were delivered to the several parties entitled to receive the same in reimbursement of their advances. (Rec., 459.)

These proceedings were all had in exact accord with the contract of January 2, 1882, which it will be remembered provided that the terminal properties should be permanently financed by the issue of mortgage bonds which were to be used *to reimburse* the several parties to the trust instrument in the "amount of their respective portions of the cost of said purchases and improvements." The temporary trustees, namely, the two railroad companies and the two individuals, were to severally convey the trust properties acquired by them to the new "*trustee* upon demand and reimbursement."

The capital stock of the Des Moines Company, under the resolutions adopted at the respective stockholders' meetings of the proprietary companies, held on November 5 and 8, 1887, was to be delivered with the bonds above provided for to the proprietary companies "in lieu for the money advanced" to purchase the terminal properties. From this it is quite evident that the parties intended such stock to represent their several equitable estates in the terminal properties, for, as above shown, the bonds of the Des Moines Company were made the means of completely reimbursing the temporary trustees for their advances, and the capital stock to be issued with them, pursuant to the above resolutions, could thus have office only as identifying the estates of the proprietors.

The agreement of May 10, 1889, making provision for the issue of this stock, gives it attributes to make effective the above intent. This agreement, the detail purposes of which are to be hereafter discussed in a further subdivision of this brief, had its inception in another resolution adopted at the stockholders' meeting of March 31, 1888, above referred to.

It was resolved that the three proprietary companies

should "pay the operating expenses, taxes and interest on bonds that are, or may be issued, after deducting an amount received from any other sources for rental, prorated on a wheelage basis," and it was further resolved that "Col. Blodgett be requested to prepare an agreement for thirty years from May 1, 1888, based upon the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company, said agreement to be approved and executed by all the lines now holding an interest in the property." (Rec., 477-8.)

As the result of this resolution and further provisions of the same, to be hereafter commented upon, the agreement of May 10, 1889 (Rec., 479), was drafted and executed. Sections twenty-four and twenty-six of this agreement defined the characteristics of the shares of stock to be issued by the Des Moines Company, and by virtue of their provisions, such shares became in fact then legally outstanding. This is important to remember in considering the effect of the resolution relating to the issue of stock subsequently attempted to be adopted by the stockholders of the Des Moines Company at the illegal meeting held by them on April 8, 1890 (Rec., 494), at which an attempt was also made to amend the articles of incorporation.

Sections twenty-four and twenty-six of the agreement of May 10, 1889, carried out the understanding of the trust instrument, that the tenancy in common should be divided into aliquot estates, each of which should be at least one-quarter of the entire common estate. It will be remembered that, by the provisions of this trust instrument, the St. Louis Company was to have a one-half interest and the Northwestern and Northern Companies a one-quarter interest each in the trust properties. (Rec., 412.)

In Article 4 of the original articles of incorporation this understanding was recognized and given force by the proviso that four members of the board of directors were to be nominated by the Wabash Company (controlling the St. Louis Company), and two members by each the Northwestern Company and the Northern Company. (Rec., 421.)

Section twenty-six of the agreement of May 10, 1889, again protects the aliquot interests of the proprietary companies on the above basis in the common estate. It recites that the second parties "are entitled to the shares of stock of said first party in the following amounts, or proportions, to wit:

The St. Louis Company to one-half said shares.

The Northwestern Company to one-quarter said shares, and the Northern Company to one-quarter said shares."

It then provides, "that as the authorized capital stock of said company is two million dollars, or twenty thousand shares of $100 each, the same shall be issued and held as follows, to wit:

One certificate of ten thousand shares shall be issued and delivered to the 'St. Louis Company.'

One certificate for five thousand shares shall be issued and delivered to the 'Northern Company,' and

One certificate of five thousand shares shall be issued and delivered to the 'Northwestern Company,' and *all of said certificates shall express upon their face that they are not transferable in whole or in part without the consent in writing of all the parties of the second part to this agreement.*" * * * (Rec., 487.)

Here was obviously shown the intent to evidence the ownership of the several estates of the respective par-

ties by the capital stock of the Des Moines Company and not, as contended by counsel for the defendants, to artificially substitute rights *in personam* identified with shares in a corporation as the sole prerogatives of the stockholders from the rights *in rem*, which theretofore were vested in them, and which, the Court of Appeals has held, they never intended to abrogate or surrender.

The issuing of shares or certificates has no magic in and of itself to alter the status of the proprietors of a corporation in their relation to its properties. Intent, as determined by what the parties in fact did in such a transaction, will be the controlling factor in an analysis of their interests. The distribution then of stock in single blocks among the parties in the proportions of their several estates, with attributes of alienation limited to unanimous consent to the end that the common estate should continue in the proprietors as an entity, was but the means of evidencing, through the conventions of a corporation, the titles of the several parties in the trust properties. Judge Hook says of this:

> "There is, however, abundant proof that the stock of that Company (Des Moines Company) was intended only to represent the interests of the Railroad Companies actually using the terminal properties, and as a method of apportionment among them. The stock was not intended as a source of personal or individual profit apart from railroad use. Stock ownership and terminal use were inseparable." (Rec., 2120.)

The above idea is emphasized by the provisions of Section twenty-four of this agreement of May 10, 1889. It provides:

> "That the 'St. Louis Company' as the owner of one-half of the capital stock of the 'Des Moines Company' may sell and transfer one-half of said stock, or one-quarter of the whole to such railway company as may be acceptable to a majority of the

parties of the second part; *in which case it is agreed that said railway company which may become the purchaser of said stock, may be admitted as one of the parties hereto, of the second part, upon the same terms and conditions as those stipulated for the other parties of the second part.* Only as aforesaid shall other railroad companies be admitted to the use of the property of the first party, without the consent of all of the parties of the second part, and the compensation to be paid by any other railroad company, or person not a party hereto (or provided for as aforesaid), for the use of said depot or terminal facilities, or any part thereof, shall be determined by the Board of Directors of said first party." (Rec., 487.)

Note that here the St. Louis Company may sell a one-quarter interest (no more and no less), that is one of the aliquot estates in the common tenancy with the consent of the majority of the parties, and that with the transfer, under such circumstances, of the stock representing such aliquot estate, is to pass as a concomitant, a right of user on a parity with the original proprietors who, as it will hereafter appear in an analysis of the agreement of May 10, 1889, paid no rent for the use of their own premises, and received in the reduction of the cost of operation of the terminal properties, revenue derived from outside companies who were not stockholders and were thus not proprietors in the enterprise. *Thus, the prerogatives of a tenant in common would be vested in each successive railroad stockholder acquiring its stock as provided in Section twenty-four.*

From the foregoing it appears that as the result of the action taken at the meeting of the stockholders of the Des Moines Company held March 31, 1888, *and the delivery pursuant thereto of bonds of the Des Moines Company to reimburse those who had advanced the moneys to acquire the terminal properties, and of the execution of the agreement of May* 10, 1889, *between the*

Des Moines Company and the three proprietary companies, they and their corporate trustee had consummated the plan contained in the contract of January 2, 1882, to organize a corporate trustee whose bonds should be used to reimburse them for advances made on account of the terminal properties and whose stock was to be issued as evidencing their respective equitable estates in the common property to which such trustee was to take title.

Stockholders' meeting of the Des Moines Company of April 8, 1890.

In the latter part of 1888, or in 1889—in any event, sometime after the passing of the resolution of March 31, 1888, A. B. Cummins became the personal counsel of the Hubbells and the Hubbells' interests, and also the General Counsel of the Des Moines Company. (Rec., 1204, 1211, 1233, 1236.) Although General Dodge was at the time nominally the president of the Des Moines Company, he resided at New York, and the whole management of the Des Moines Company was left to Hubbell, who, in addition to being an officer and an agent of the same, was regarded as the confidential agent of the Wabash Company at Des Moines. (Rec., 132-136, 233.)

In January, 1890, Mr. Cummins, acting ostensibly on his own initiative and independently of Hubbell, conceived the idea that certain amendments should be made to the articles of the Des Moines Company. He had had nothing to do with the drafting of the contract of January 2, 1882, or with the drafting or adoption in 1884 of the articles of the Des Moines Company, and he testified that, while he was familiar with the contract of May 10, 1889, he had had nothing to do with the negotiations and formulation of this agreement. (Rec., 1205.)

At a meeting of the stockholders of the Des Moines Company held January 3, 1890, at the instance of Cummins the question of amending its articles and of issuing stock for the purchase price of the properties was referred to Attorneys Blodgett and Cummins. (Rec., 1307.) No conference, however, took place between Blodgett and Cummins, and Cummins alone redrafted the proposed amendments to the articles. In a letter to Blodgett dated January 22, 1890, he urges the necessity of a redraft of the articles (Rec., 1210), and in a letter to Dodge dated January 22, 1890, he writes that

> "you will observe that these amendments are directed to two purposes: First, to clear up the ambiguity and uncertainty with respect to the *amount* of stock to be issued on account of the original purchase of the property. Second, to enable the Des Moines Union Railway Company to act in all matters without the previous authority of three corporations." (Rec., 1212.)

In addition to preparing the drafts of amendments to the articles, Cummins also drafted all resolutions, planned the procedure for the stockholders' meeting of April 8, 1890, and as he said parcelled out the resolutions among the members who were present to be offered from time to time. (Rec., 1217.)

The record of the meeting shows that among others he attempted to accomplish three things:

> *First.* To distribute among the proprietary companies, instead of two million dollars of capital stock to represent their respective interests in the terminal properties, as provided by the agreement of May 10, 1889, four hundred thousand dollars of stock for this purpose, to be divided in exactly the same proportions as provided by said agreement.
>
> In this respect he still left intact the characteristics and the limitations relating to the issue of the capital stock, as provided in Sections twenty-six and twenty-four of the agreement of May 10, 1889. The remainder of the stock in excess of the four hun-

dred thousand dollars was to be issued only by authority of a resolution of the stockholders adopted by the vote of more than seven-eighths of all of the stock theretofore issued.

Second. To alter aliquot interests in the common properties from quarters to eighths. In this respect it required the votes of *more* than seven-eighths of all the stock theretofore issued to elect a director; but "to authorize the execution of mortgages, to issue bonds, to enter into contracts, to construct buildings, to make leases, to authorize the institution of condemnation proceedings, and to do all such other things that may be proper or necessary for the corporation to do * * * except the ordinary operation of the property, the board of directors can act only upon the unanimous vote of the eight members thereof." Moreover, a vote of more than seven-eighths of all the stock was required to amend the articles. (Rec., 492-3.)

Third. To repeal, strike out and expunge the proceedings of the meeting of the incorporators held December 10, 1884 (being the meeting at which the original articles were adopted), "with certain preambles including a contract executed on the 2nd day of January, 1882." (Rec., 494.)

Before discussing the significance of the above amendments, attention should be called to the fact that the so-called stockholders' meeting, at which they were supposed to have been adopted, was for the reasons hereafter shown, undoubtedly illegal. Of this the majority opinion of the Court of Appeals says that "the claim that the amendments were never properly adopted is well taken, but not open to the complainants," and the reason assigned for the latter conclusion is that the proprietary companies were present at this meeting by authorized agents, and that under such circumstances the *legally* ineffectual attempts to amend articles and pass resolutions amounted in fact to a contractual understanding between them, creating a situation inconsistent with the contentions now advanced by the complainants.

In weighing the reasoning by which such conclusion was reached, it is to be remembered that the interests at issue and supposed to have been disposed of at this meeting, in the manner above stated, were equitable estates in real property vested in the proprietary companies to the same extent from the standpoint of being actually owned and possessed property, as if the legal title to such real estate, as well as the beneficial interest therein, had stood in their respective names. It is beyond question that property rights of such character can be transferred, released or surrendered in the instance of corporations only by corporate action, evidenced by some form of instrument of assignment. In the case of *Brown* v. *Fletcher* (*supra*) this Court has said that they passed by deed.

In the light of the above principle, the legality of the stockholders' meeting of April 8, 1890, is important for the purpose of determining what in fact could have legally taken place there affecting the *property* rights of the proprietary companies.

The majority opinion of the Court of Appeals says:

> "When the corporation undertook to amend its fundamental law, that could be legally done only by the stockholders. There was no stock issued; there was only a right to stock through the contract of 1889." (Rec., 2110.)

The minutes of the meeting show as present in person How, Hayes, F. M. Hubbell, Martin, F. C. Hubbell and Cummins as representing one share each and by proxy, G. M. Dodge by L. M. Martin, representing one share and W. H. Blodgett by J. F. How, representing one share. It is then recited that:

> "There was also present the 'Northwestern Company' by F. M. Hubbell, president.
> The 'Northern Company' by A. B. Cummins, president.

The 'St. Louis Company' by J. F. How, president."

It was then "determined that all the stockholders of said company were present either in person or by proxy duly filed with the secretary of the company." (Rec., 489.)

F. M. Hubbell testified that neither the stockholders nor directors of any proprietary company had adopted any resolution or had issued any proxy authorizing anyone to be present at such stockholders' meeting of April 8, 1890, or to vote thereat any share or shares of stock of such company. (Rec., 1165-1169.) It is thus apparent that, so far as corporate action of the Des Moines Company is concerned, the resolutions offered at such stockholders' meeting of April 8, 1890, purporting to amend its articles and providing for the issue of its capital stock, were not legally adopted.

But the factors that made the corporate action of the Des Moines Company illegal, also show want of corporate action on the part of the proprietary companies, sufficient to surrender or release to their corporate trustee, their respective estates in common in the terminal properties; for without yet considering what the parties intended to accomplish at the stockholders' meeting of April 8, 1890, it is very clear that Hubbell, Cummins and How could not, either individually or by concerted action, convey away the several estates of their principals. *These principals could alone do this through execution of their own deeds of assignment.* Furthermore, in the sense of severally representing their own companies in the making of a supposed contract at this meeting, these parties could have acted only in an oral manner, for the record in writing there made, even if signed by the parties present, could only purport to represent the sole corporate action of the Des Moines Company.

The intent of the parties in amending the articles of incorporation of the Des Moines Company and the result thereby accomplished, irrespective of the legality of the stockholders' meeting.

(1) *The status of the parties.*

There were no innocent purchasers for value in the transactions had at the so-called stockholders' meeting of April 8, 1890. The relations of the proprietary companies with the Des Moines Company, was not contractual, for the Des Moines Company was an active trustee created by the proprietary companies to conserve their several equitable estates. Likewise, in respect of protecting their common title to and the common use of the terminal properties, each cotenant stood in its relations with its other cotenants in a noncontractual status, for as to their common vested interests, the proprietary companies were made by law reciprocal trustees.

Rothwell v. *Dewees*, 2 Black, 613, at 618.
Bissell v. *Foss*, 114 U. S., 252, at 259.
Turner v. *Sawyer*, 150 U. S., 578, at 586.
Starkweather v. *Jenner*, 216 U. S., 524, at 528.

Thus, as a result of this trust relationship, no cotenant could take advantage of inadvertent or legally insufficient acts of another cotenant to the derogation of its ownership or right of use in the common properties.

It follows therefore that, if the proprietary companies came to the above stockholders' meeting with their rights in the above respect intact, these rights could have been parted with in favor of the Des Moines Company, or of one cotenant as against another only by an act of clear intent and some form of separate or con-

certed assignment in writing, based upon due corporate action and an actual consideration.

In the absence of the above facts, no estoppel could arise in favor of one as against the others, and if these facts existed the doctrine of estoppel to protect an altered status of interests need not be invoked.

That all of the above essentials of intent and action were wanting in the transactions of the parties will appear upon analysis thereof.

(2) *The reasons assigned by Cummins for the making of the amendments.*

These reasons were threefold:

(1) He thought it "very wise to have it so arranged that every railroad that might come into the depot in the future might become the owner of one-eighth of the capital stock." (Rec., 1208.)

(It is to be remembered in this respect that the agreement of May 10, 1889, authorized the sale of proprietary interests only in quarters.)

(2) He thought that two millions of capital stock should not be distributed among the stockholders. (Rec., 1208.)

(3) He thought that the articles of incorporation were inconsistent with the contract of January 2, 1882. In this respect he had told the parties "that the contract provided for a title of the property in trust for the three companies which had signed it and for the joint use and occupation" of the terminal properties. (Rec., 1209.) He was therefore of the opinion that in view of the conveyances which had been made to the Des Moines Company and the reimbursement in bonds, and the provision in its articles "for the issuance of capital stock for the remainder of the purchase price, if any, that it was imperative to clear up the title and get rid of any question of doubt respecting the ownership of the Des Moines Union Railway Company and its right to manage its own property. These were the reasons which led up to my suggestion that there ought to be an amendment to the articles of incorporation

that would put this company, beyond any question, in the ownership and control of its property. * * *" (Rec., 1210.)

In other words, the situation may be summed up as follows:

The personal counsel for the Hubbell interests, at a time when Hubbell had already purchased from the Wabash purchasing committee a two-eighths interest in the stock of the Des Moines Company and was engaged in negotiating for the purchase of a further one-eighth interest in the same, having reached the conclusion that trust estates were undoubtedly provided for by the proprietary companies under the contract of January 2, 1882, and having the belief that the Des Moines Company might have taken title to the terminal properties for the purpose of carrying out these trusts, decided that it would be advisable to alter the articles of the trustee by a "nunc pro tunc" declaration of intent for the purpose of causing it to repudiate retroactively these very obligations, which were the sole excuse for its existence.

That is to say, having speculated upon the possible existence of trust estates in the proprietary companies, he intended to remove the cloud in this respect upon the titles of the trustee, the Des Moines Company, by destroying these estates without a penny of consideration to the beneficiaries thereof, without any authority from them, without the execution by them of any instrument of assignment and alone through this form of corporate action of the trustee.

The evidence of Mr. Cummins, relating to the above subject matters is equivocal. He admits on cross-examination that the trust had never been abrogated, except (as he puts it), "as in the original articles themselves, or the amendment" later made, "increasing the capital stock to two million dollars." (Rec., 1241.) Yet

he repeatedly states that the amendments to the articles attempted to be made at the meeting of April 8, 1890, were not intended to affect titles. "That," he said, "had been effected before." (Rec., 1247.) While the trust was not entirely abrogated (whatever this may mean), the original articles, the conveyances made to the Des Moines Company, and the conduct of the parties, in his view, had partially brought this about. (Rec., 1248.) He was clearing up uncertainties in this respect as he would "in a bill to quiet title to property upon which I might think there was a cloud." (Rec., 1258.) The trust created by the contract of 1882 was destroyed in part, in his opinion, by the articles of incorporation. (Rec., 1244.)

He never stated what part of the trust estate was left or what was the value of this remainder which he proposed to destroy without consideration to the beneficiaries through a repudiation of the same by the corporate action of the trustee.

If the foregoing was his intent, was not his letter of January 7, 1890 (Rec., 1211), to Dodge somewhat disingenuous in stating that the amendments were intended "to clear up the ambiguity and uncertainty with respect to the *amount* of stock to be issued on account of the original purchase of the company, and to enable the Des Moines Union Railway Company to act in all matters without previous authority of three corporations."

There is no evidence in the record that the proprietary companies or their authorized agents had the slightest idea that the proceedings of April 8, 1890, were intended to terminate a trust or to effect a surrender of trust estates.

Indeed to suggest such an intent is to insult intelligence, for if Hubbell, Cummins and How intended and

tried to surrender at the stockholders' meeting of April 8, 1890, the equitable estates of their principals they were engaged in perpetrating a fraud upon them; since, if this was the nature of the transaction, the proprietary companies not only did not receive a dollar of consideration in exchange for their interests, but they also gave up the distribution among themselves of the entire capital stock of their trustee, namely $2,000,000, and accepted in lieu thereof, only one-fifth of such stock, namely $400,000, leaving the remainder to be sold to other railroad companies, thus reducing their stockholding interests in the property, if this was all they were to have, to a relatively small proportion of what was originally intended.

The result of the amendments, assuming their validity.

(1) *The amendment dividing aliquot interests into eighths instead of quarters.*

This amendment continues that attribute of the stock of the Des Moines Company consonant with the intent of the parties that stock should represent proprietorship in the terminal properties, for it is to be remembered that under the agreement of May 10, 1869, provision was made for the admission of railroad companies as outsiders to the use of the terminals without the ownership of stock, with the proviso that they should pay rental, which was to be used in reducing the cost of operation among the proprietary companies. If a railroad company, holding an eighth interest in the capital stock of the Des Moines Company, was to acquire thereby no rights of user or proprietorship in the terminal properties, because thereof, why the comment of Mr. Cummins that it would be wise to permit railroads to come in upon the ownership of eighths, instead of quarters?

Unanimous consent of the proprietors was required before stock could be purchased by another railroad company, and likewise this unanimous consent was required before a railroad company, without capital stock, could be permitted to use the terminals. If stock holding as such brought no prerogatives of ownership, why should it be sold to newcomers only in eighths, instead of in single shares.

(2) *Amendment authorizing the issue of four hundred thousand dollars of capital stock, instead of two million dollars, in proportions identical with those provided for in the agreement of May* 10, 1889.

This amendment left intact, both as to apportionment and characteristics, all the attributes of the capital stock of the Des Moines Company contemplated in the contract of January 2, 1882, in the original articles adopted December 10, 1884, and provided for in detail in the agreement of May 10, 1889, with one significant difference, namely, if the allotment of stock to every proprietary company was not to represent its equitable estate in the terminal properties, the stockholders were voluntarily or unwittingly, *and without consideration*, surrendering the right to have distributed among them the entire capital stock of the Des Moines Company, and were accepting in lieu thereof, an aggregate distribution among them of only one-fifth of its capital stock, with the proviso that the remaining four-fifths might eventually be sold, presumably to other railroad companies. Thus, if they were only stockholders, and not tenants entitled to a common use of the properties, their proportionate interest in the terminals was reduced from one-quarters to possibly one-twentieths.

(3) *Article* 15 *expunging the proceedings of the meeting of December* 10, 1884. (Rec., 494.)

It is difficult to understand what was expected to be accomplished by the so-called expunging of the proceedings of the meeting of incorporators held six years earlier. Assuming that it is possible to wipe resolutions from records, corporate actions had as a result thereof, will not thereby be given an altered significance.

Intent cannot be made retroactive.

But irrespective of intent, the rule is elementary that existing rights are not affected by changes in the charter or articles of a corporation.

Woodruff v. *Trapnall,* 10 How. (U. S.), 190.
Curran v. *State Bank of Arkansas,* 15 How. (U. S.), 304.
Hawthorne v. *California,* 2 Wall. (U. S.), 10.

If the proprietary companies did not intend to and did not in fact convey their equitable estates to the Des Moines Company by the deeds of the temporary trustees, executed and delivered to it in 1887 and 1888, the action had at the meeting of the Des Moines Company on April 8, 1890, surely did not effect such conveyances. If, on the other hand, Article 15 was intended to be prospective in effect, for the purpose of removing a cloud on titles, it was equally ineffectual. Moreover, it is inconceivable that, if such was the intent of the parties at the time it was adopted, they did not pursue the obviously effective course of executing mutual quitclaim deeds of their equitable estates to the Des Moines Company. To be sure, one cannot understand what would prompt them to do so under an arrangement which would not give them a dollar of consideration for the assignment of their property rights.

In contrast with any such possible corporate action, by amended Article 14, they "approved, ratified and confirmed" in their full and original significance, the conveyances made by the temporary trustees to the permanent trustee, and the issuance of the mortgage bonds in reimbursement therefor, thus reiterating all that they intended to do by virtue of the resolutions of January 1, 1885, and of November 5 and 8, 1887, and the deeds of conveyance made pursuant thereto.

(4) *The resolution adopted fixing the value of the terminal properties at* $861,257.21, *as of the date of the conveyance thereof, instead of* $461,257.21, *being the actual cost thereof as recited at the meeting of stockholders of March* 31, 1888, *and the issuing of* $400,000.00 *of capital stock upon the basis of the above value.* (Rec., 494.)

After the amendments to the articles of incorporation were adopted, Mr. Cummins offered a resolution which was unanimously adopted, reciting in substance that there was some uncertainty in the records of the company respecting the purchase price of the terminal property; that it was agreed that the same should be purchased at its fair value, payable partly in mortgage bonds and partly in capital stock; that it was agreed that said property was fairly worth the sum of $861,257.21 (that is $400,000 more than the aggregate amount recited in the resolution of March 31, 1888 (Rec., 476), above referred to, to be due the several parties therein named "for money expended for the property acquired for this company," and for which bonds had been delivered in reimbursement), of which purchase price the purchasing committee of the Wabash Company, as the real owner of the St. Louis Company, is entitled to $470,110.80, the

Northwestern Company $215,058.40, the Northern Company to $100,000, G. M. Dodge to $74,088.01 and Polk and Hubbell to $2,000; that by a settlement theretofore made, the purchasing committee has received 270 bonds of $1,000 each, G. M. Dodge 74 bonds, Polk and Hubbell 2 bonds and the Northwestern Company 115 bonds, making in all 461 bonds; that as a further part of said purchase price, the Des Moines Company has paid to the purchasing committee, G. M. Dodge and the Northwestern Company $257.21; that there still remains $400,000 of the purchase price yet unpaid to be paid in capital stock; that by agreement between the several persons and corporations owning the property prior to the transfer so much of the purchase price as was to be paid in capital stock was to be divided one-half to the St. Louis Company, one-quarter to the Northern Company and one-quarter to the Northwestern Company; that the articles have been amended to conform to the true intent of the several parties.

It was thereupon resolved:

First. That the purchase price of the property originally acquired, be fixed at $861,257.21.

Second. That the payment of a portion of said purchase price, as above set forth, be confirmed and approved.

Third. That, to complete the payment of such purchase price, one-half of the stock be issued to the purchasing committee, one-quarter to the Northern Company and one-quarter to the Northwestern Company.

Fourth. That proceedings heretofore had, respecting the issuance of capital stock so far as said proceedings are inconsistent with the amendments to the articles of incorporation or with this resolution, are hereby modified.

Certain things are obvious from the foregoing resolution. It is a colorable recital of facts, made in conventional form, to give the stock interests of the several

proprietary companies theretofore issued under the agreement of May 10, 1889, an appearance of being fully paid and of being issued as a substitute for the properties conveyed to the Des Moines Company.

The arbitrary *fixing* of the purchase price of the property *"as of the date of the conveyance thereof,"* at $861,257.21, instead of $461,257.21, flies in the face of the settlement made between the proprietary companies and the Des Moines Company, pursuant to the resolution of March 31, 1888 (Rec., 476), in which it appeared that the cost of the properties aggregated $461,257.21, and wherein it was resolved, as provided for by the contract of January 2, 1882, that the temporary trustees should be reimbursed for this amount in the proportion of their several advances by the mortgage bonds of the Des Moines Company. The reimbursement thus provided for had taken place, and the transactions identified with the transfer of title to the trustee company were a concluded subject matter.

The fixing of such purchase price at four hundred thousand dollars in excess of the amount for which the temporary trustees were reimbursed in the bonds of the Des Moines Company, and the identification of the capital stock of such company as a consideration paid to the proprietary companies to represent the values of such excess, is also directly contrary to the resolutions adopted on November 5th and on November 8, 1887, by the proprietary companies, providing that the stock of the Des Moines Company should be transferred together with its bonds "in lieu for the money advanced," to purchase the terminal properties and the consummation of this proviso by the issuing of stock pursuant thereto under the agreement of May 10, 1889.

The recitals therefore, above summarized from the

resolution adopted April 8, 1890, are disingenuous and contrary to fact. Whatever their intent be, they must have been ineffectual, for they could not recall a concluded transaction and manufacture corporate assets for stock where none had theretofore existed.

Moreover, that the scheme was disingenuous, and that the purchase price of the property was artificially fixed for the purpose of giving the capital stock to be issued, an appearance of being fully paid, Mr. Cummins himself expressly states. He found that there were 461 bonds outstanding and he added $400,000 to the actual cost of the terminal properties *as of the date of the conveyance thereof,* because he "thought it would *stand* $400,000 without creating any liability upon the part of those who held it to make good for unpaid stock, if the company should get into trouble and fall into the hands of a receiver." (Rec., 1241.) Referring to the equity above actual cost, he said:

> "Of course I understand it couldn't have sold for $400,000 at that time." (Rec., 1240-1.)

The ineffectuality of the resolution, however, upon the theory upon which it was based, is exposed in the distribution of stock in the original proportions contemplated by the trust instrument, namely, in one-half and one-quarters and not on what could have been the only theory of adding stock to bonds to make up an increased purchase price, namely, by prorating stock in the same ratio that bonds were distributed on the assumption that each party, conveying property to the Des Moines Company, should receive his pro rata share of the increased value, representing the purchase price to the Des Moines Company, of such property over and above the actual cost of the same, paid for by the bonds already delivered to him for purposes of reimbursement.

The foregoing amendments could not affect the con-

veyance to the Des Moines Company of the equitable estates of the proprietary companies, which had theretofore continued to be vested in them, for the Des Moines Company as a trustee could not by its own corporate process repudiate or destroy the trust estates. Independent corporate action on the part of the proprietary companies could alone produce such a result. *And as hitherto stated, after the conveyances made by the temporary trustees to the Des Moines Company as the permanent trustee of the trust properties, in the fall of* 1887 *and the winter of* 1888, *no deeds, conveyances or assignments of any character were ever made by the proprietary companies, or any of them, to the Des Moines Company of any of their interests in the trust properties and no corporate action for this purpose was ever thereafter had by any of them.*

It is difficult to appreciate how these several companies could be legally present at a stockholders' meeting through the agencies of the above individuals, but, without respect to this query, it is beyond question that any action taken by these persons at such stockholders' meeting of the Des Moines Company must be regarded as identified alone with *its* corporate activities.

Whatever their intent and in whatever capacity each of them may have appeared at such stockholders' meeting, it was not within their power, either by individual or concurrent action, to convey away, release or alter the status of the respective equitable estates in the terminal properties then existing in the proprietary companies.

It is fitting to conclude this subdivision with the statement that Hubbell testified repeatedly to the fact that he never regarded the amendments, supposed to have been made at the stockholders' meeting of April 8, 1890, as having any effect on the title to property or on the value

of the stock. (Rec., 1081.) He relied upon the deeds made by the temporary trustees to the Des Moines Company, the original articles of incorporation, and the agreement of May 10, 1889, which he construed as a lease, as establishing in the Des Moines Company the beneficial interests which gave his stock holdings value. (Rec., 1075, 1083.)

(5) *The amendments to the articles were not published so as effectively to eliminate the contract of January 2, 1882, from the original articles of incorporation.*

Finally and wholly apart from all other infirmities in the alleged proceedings for the amendment of the articles of incorporation, we insist that the proceedings taken were wholly ineffectual to discharge the Des Moines Company from its charter obligations to observe the trust created by the contract of January 2, 1882, by virtue of the incorporation of said contract in its articles as a part of its organic law.

By Chapter 88 of the acts of assembly of Iowa of 1888, in force April 8, 1890, it is provided:

> "That any of the provisions of the Articles of Incorporation may be changed at any annual meeting of the stockholders or special meeting called for that purpose; but said changes shall not be *valid* unless recorded and *published* as the original articles are required to be; and said changes in the articles need only be signed and acknowledged by the officers of said corporation."

Pursuant to the above provision, the Des Moines Company published notice of the amendments to its articles, and this published notice, which appears in the record as Exhibit 614 (Rec., 2010), contains no reference whatever to the new article 2, supposed to be substituted in place of the original article 2, which contained the provision that

"All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract (recited in the preamble of the articles), entered into on the 2nd day of January, A. D. 1882."

We submit, therefore, that the above provision of the original articles is in full force and effect, and has been in no manner or to no extent impaired by the supposed amendments of April 8, 1890.

The above conclusion is fortified by what the Supreme Court of Iowa has said respecting the effect of these amended articles. In *Morgan* v. *Des Moines Union Railway Company* (the Des Moines Company here), 113 Ia., 561, the question of the powers of that company was in issue. The court, after quoting article 2 of the original articles, states:

"These articles were afterwards amended, but in no way was the language set out qualified in the amendment."

It is also to be noted that Judge Wade of the District Court, in referring to the amendment to the articles of incorporation, says:

"It does not appear that it was intended to affect any right then existing, and even if such intention existed on the part of anyone, it was not manifest, and I find nothing which would give it effect." (Rec., 2047.)

The independent transactions of F. M. Hubbell in respect of the trust properties.

That it was farthest from the intent of the purchasing committee or of the defendants to repudiate or destroy the trust estates, is demonstrated by the contemporaneous transactions taking place between Hubbell and the purchasing committee, set out in full in the third subdivision of the statement of facts, and now to be commented upon.

The above transactions resulted in two successive purchases by Hubbell from the purchasing committee of the Wabash Company of first, a quarter interest in the stock of the Des Moines Company, of which General Dodge took one-half, thus vesting in each of these parties an eighth interest in such stock, and second, a further purchase by Hubbell from the purchasing committee of an eighth of the total amount of stock of the Des Moines Company, thus leaving the purchasing committee of the Wabash Company with only an eighth interest in the Des Moines Company, instead of its original one-half.

In considering the significance of these transactions, which thus resulted in the transfer of stock ownership, it is very important to note that Dodge and Hubbell became but the channel by which the one-eighth interest, acquired by Dodge, and the two-eighths interest acquired by Hubbell, were transferred at the inception of its existence, to the consolidated corporation composed of the union of the Northern and Northwestern Companies and controlled by Hubbell and Dodge, Hubbell owning approximately six thousand out of ten thousand shares of this company. Thus, these transactions were not the source of the five-eighths stock holding interest which Hubbell now has in the Des Moines Company and upon which he bases his claim to control the corporation.

The foregoing is important in a determination of what both Hubbell and Ashley, in their negotiations, understood to be the nature of the property interests evidenced by the capital stock of the Des Moines Company. The correspondence and transactions of the parties, relating to these stock transfers, is set out in full in subdivision III of the statement of facts and particular attention is called to the same.

On June 12, 1888, Hubbell wrote Ashley, asking permission to offer for sale a quarter interest in the Des

Moines Company to parties making inquiry of him. (Rec., 1059.) On June 16, 1888, Ashley replied stating that he thought the purchasing committee would be glad to sell a one-quarter interest, but that he had always supposed "that it would be necessary to confine the sale to such railway companies as could be interested in the station." He mentioned the Chicago and North Western Ry. Company and further said:

> "was there not an understanding or agreement as to the sale of the stock when the terminal company was formed and would it not be prejudicial to the interest of the whole to part with the stock to outsiders." (Rec., 1059.)

On June 18, 1888, Hubbell replied:

> "I agree with you that the sale of a quarter interest in the stock of the terminal company should be made only to a railway company, who will join with the Wabash in making a contract with the Des Moines Union, guaranteeing the interest upon the bonds and operating expenses, etc. * * * I understand it, as you do, that the stock cannot be sold without consent of the different railroad companies who now form the Terminal Company." (Rec., 1060.)

At this juncture it is at least clear that Hubbell was working in harmony with the conception that stock could only be sold in one-quarter interests and must eventually be held by railroad companies who would thereby enter the terminal enterprise on a parity with the original proprietors. This idea was in exact harmony with the intention constant with the proprietary companies, that stock should be identified with ownership and therefore should represent an aliquot estate in the tenancy in common.

Later in the year 1888, Hubbell unsuccessfully attempted to persuade the purchasing committee to surrender a one-quarter interest of the stock to the Des

Moines Company, presumably to enable that company to sell the aliquot portion of the estate represented by it to another railroad company. In February, 1890, Hubbell obtained from Ashley an option to buy $135,000 of the bonds and a one-quarter interest in the capital stock of the Des Moines Company for $135,000 (Rec., 1339), and as a result of this option, Dodge and he acquired from the purchasing committee each an eighth interest in the stock of the Des Moines Company. (Rec., 1601.)

Memoranda of agreement in identical form, made between the purchasing committee and Hubbell and Dodge respectively, relating to these one-eighth stock transfers, are very important. This memorandum recites that in the articles of incorporation of the Des Moines Company, it is provided that the Wabash Company shall nominate four directors; that the stock of the Des Moines Company is now held by different parties and in different proportions from what it was when said articles were adopted, and that it was agreed therefore, between the purchasing committee and Hubbell (and Dodge) who had acquired a one-eighth ownership of the stock of the Des Moines Company that the purchasing committee would consent to such change in the articles of the Des Moines Company as would permit one director to be nominated by any person or corporation holding one-eighth of the stock of the Des Moines Company. (Rec., 1601.)

In other words, the parties controlling the three proprietary companies had agreed that thereafter aliquot estates in the common tenancy might be transferred in eighths, instead of quarters. This is what was cared for as before shown in the amendments made in the articles of the Des Moines Company.

In the last transaction had between Hubbell and the purchasing committee, it conclusively appears that both

parties always understood ownership of stock to be identical with ownership of property, and that in this respect, an eighth interest would be sufficient to represent a proprietorship, for they expressly said so.

At the time of the foregoing transactions Hubbell began negotiating with the purchasing committee of the Wabash for the purchase of an additional one-eighth share of its interest in the Des Moines Company. On April 1, 1890, he wrote Ashley, asking the terms upon which such one-eighth interest could be purchased. (Rec., 1061.) On April 5, 1890, Ashley replied, giving his price with this statement contained in his letter:

> "IT MUST BE UNDERSTOOD, OF COURSE, THAT A ONE-EIGHTH INTEREST IN THE CAPITAL STOCK SHALL BE SUFFICIENT TO REPRESENT A PROPRIETORSHIP IN THE COMPANY ACCORDING TO THE UNDERSTANDING WE HAD WHEN YOU WERE HERE." (Rec., 1063.)

On these terms Hubbell consummated the purchase of the additional one-eighth interest in the Des Moines Company. When certificates of stock were eventually issued by the Des Moines Company a one-eighth interest was issued to Hubbell, a one-eighth to Dodge, and a few months later an additional one-eighth was transferred to Hubbell; and as before stated, on the consolidation of the Northern and Northwestern Companies on October 12, 1891, these two parties transferred their interest in the Des Moines Company to the consolidated company, thereby giving that company with the original two one-quarter interests, derived from its constituent companies, a seven-eighths interest in the estate in common. (Rec., 1461.)

It is contended by counsel for the defendants that the sale by the purchasing committee of an aliquot portion of its stock in the Des Moines Company to individuals, represents an anomaly in the contention that stock

was intended to evidence proprietorship in the trust properties, and that, therefore, the purchasing committee perpetrated a disingenuous transaction upon Hubbell. The answer to this proposition is very clear. It is true that the scheme contemplated, that railroads alone could be proprietors in the common enterprise, as is shown by Section twenty-four of the agreement of May 10, 1889, and could only become such upon unanimous consent. Still this is not to say that, with all parties agreeing and having full knowledge of the situation, Hubbell could not have been made a proprietor to the extent to which persons, as distinguished from railroads, might be able to benefit thereby. *It is to be remembered that the character of the beneficial interest that Hubbell and Dodge acquired in the stock transferred to them, is not on trial and should have no bearing or influence in this case. Hubbell presumably wished to acquire such stock for a sale at a profit to other railroad companies who might seek to use the terminals, and he and Dodge in fact became merely the channel by which they did transfer at a profit their respective interests to the proprietary company controlled by them; but whether or no the transfers of stock to Hubbell and Dodge were anomalous in the sense that there could not be vested in them as individuals that character of beneficial interest in the common estate which could only be enjoyed by railroad companies, it is beyond question that this anomaly had no equivocation of a character that could possibly destroy the proprietary estate of the purchasing committee as the successor of the St. Louis Company, as long as it was expressly agreed between the parties "that a one-eighth interest in the capital stock shall be sufficient to represent a proprietorship in the company."* (Rec., 1603.)

It is appropriate to conclude this subdivision by calling attention to the annual reports that were made by

the Des Moines Company for purposes of taxation to the executive council of the State of Iowa, on December 31, 1888, 1889 and 1890, and on January 1, 1892, and 1893. In each of these reports appears the following:

> "The Des Moines Union Railway Company is simply a 'Representative Company' acting as an agency at Des Moines for the Wabash Railroad Company, the Des Moines and Northwestern Ry. Co., and the Des Moines and Northern Railway Company, performing all the necessary work for them and charging each road at actual cost, its due proportion of the expense, thereby incurred." (Rec., 731.)

The officers of the company verified these reports, and in the instance of 1891, F. C. Hubbell was the verifying president. (Rec., 721, 723.) It is significant that the report signed and verified on February 16, 1894, immediately succeeding the transaction of January 29, 1894, by which Hubbell acquired his five-eighths interest in the Des Moines Company, states that the Des Moines Company "is the owner of the property hereinbefore described." (Rec., 724.)

V.

"THE SERIES OF ACTS AND CIRCUMSTANCES" THROUGH WHICH, IN THE MAJORITY OPINION OF THE COURT OF APPEALS, THE PROPRIETARY COMPANIES ARE SUPPOSED TO HAVE "GRADUALLY LET SLIP FROM THEM THE EXCLUSIVE OWNERSHIP AND CONTROL WHICH THEY HAD AT THE BEGINNING SO MUCH VALUED AND SO CAREFULLY GUARDED" WERE ALL IN HARMONY AND CONSISTENT WITH THE CONTINUED EXISTENCE OF THEIR RESPECTIVE PROPRIETARY INTERESTS.

THESE ACTS AND CIRCUMSTANCES ARE TO BE INTERPRETED IN THE LIGHT OF THE FOLLOWING PRINCIPLE, NAMELY, THE EQUITABLE INTEREST THAT EACH OF THE RAILWAY COMPANIES, PARTY TO THE CONTRACT OF JANUARY 2, 1882, ACQUIRED IN THE TERMINAL PROPERTIES OF THE DES MOINES COMPANY WAS MORE THAN A RIGHT IN PERSONAM OR CHOSE IN ACTION—IT WAS A RIGHT IN REM, NAMELY, AN ESTATE IN PROPERTY VESTED IN THIS RESPECT TO THE SAME EXTENT AS THOUGH THE LEGAL TITLE THERETO HAD BEEN CONVEYED TO SUCH COMPANY.

The conclusions reached in the majority opinion of the Court of Appeals are based upon the premise of the existence of a trust and the loss by the beneficiaries of this trust, without their design or intention, of all their rights under the same through successive acts on their part "natural," "harmless" and inadvertent. In the above respect the Court said:

> "(a) The title contemplated was a trust. The legal title to be 'in a trustee to be named by agreement of said companies.' The beneficial estate to be in the three companies in proportion to the parts each contributed to the payment therefor." (Rec., 2096.)
>
> "(b) Thus the railways themselves had, through a series of acts and circumstances extending over many years, gradually let slip from them the exclusive ownership and control which they had at the

beginning so much valued and so carefully guarded." (Rec., 2114.)

"(c) There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances." (Rec., 2113.)

Judge Hook in his dissenting opinion has the following to say of the position of the majority:

"In both aspects of its position towards the proprietary companies the terminal company was in a high sense their trustee; and according to salutary principles it was bound to maintain the integrity of that relation. Being itself a corporation, its fiduciary obligations and disabilities rested equally upon its officers through whom alone it could act. The limitations upon the right of a person in such a capacity to act for his personal benefit with respect to the subject of the trust are familiar. Never are they less than that the dealing must be open, avowedly at arm's length, and without contrivance or concealment. The individual defendants, one or the other or both, were, at all the times material in this case, officers and directors of the terminal company. The conclusion of my brothers, briefly stated, is that by a series of transactions occurring in a long course of years the original character of the terminal company was gradually changed into that of an independent corporation, and that the control of it was lost by the railroad companies and was acquired by the individual defendants who were its officers. But they say: *'There is nowhere any indication that the railways intended any such result, and yet such, in our judgment, is the result. This unexpected outcome was the product of several circumstances.'* In other words, the proprietary companies were not cognizant of the trend of the circumstances, and the result held to follow, though unexpected and not intended by them, is enforced because of a legal presumption of intention of natural consequences of acts, regardless of intention in fact. The circumstances relied on do not appear to me to have the

significance attributed to them, but were it otherwise the presumption should not be so broadly applied to the case of a trust the destruction of which is claimed by those subject to the disabilities of trustees dealing for themselves. *The excerpt quoted above touches the quick of this controversy.* In my opinion the various transactions thought to produce a result so unexpected and unforeseen should be severally examined in the light of the surroundings at the time they occurred. If in one aspect they were then consistent, or not apparently inconsistent, with the frequent and studied declarations of the object of the terminal organization and that view was then reasonably entertained by the railroad companies, that view should prevail in a court of equity rather than a shrewder one tending to a conclusion in favor of participants who were bound in good conscience to the contrary." (Italics ours.) (Rec., 2119.)

A sufficient answer to the theory upon which the conclusions in the majority opinion are reached ought to be that it is based upon a fundamentally erroneous conception of the principle of law, applicable to the status of the parties. It is assumed that, upon the creation of the Des Moines Company designed as the corporate entity to hold legal title to the terminal property owned by the proprietary companies, the future relations between that company and the proprietary companies would be contractual. Such was not in any respect the essence of this relationship, for properties charged with a trust are "held—not in opposition to but—for the benefit of the beneficiary." (*Brown* v. *Fletcher,* 235 U. S., 589.) Thus, in equity the parties were, in respect of the trust proprietors, one and the same. (Pomeroy's Equity Jurisprudence, Fourth Edition, Section 975.) Beneficial estates, established and reserved upon such a principle of law, cannot be lost by inadvertence to the very party created to hold them intact, for a conveyance to it, the trustee, is in fact

a conveyance to the *cestui*. This principle is the true guide to a proper interpretation of the "series of acts and circumstances" relating to the trust properties.

This series of acts and circumstances upon which the majority opinion of the Court of Appeals relies for its conclusions is as follows:

(1) *The Articles of Incorporation of the Des Moines Company adopted December* 10, 1884. (Rec., 416.)

These articles are based upon the premise that the Des Moines Company was organized for the sole purpose of making effective the trust created by the contract of January 2, 1882; for the resolution of the incorporators adopting them so recites, the contract of January 2, 1882, is set forth in them as a preamble to their provisions, and article 2 thereof provides that all the powers exercised by the company shall be in accordance with the terms and spirit of said contract.

After the concentration of the trust properties in the company organized for the above purpose, no equitable tenant in common in such trust properties ever conveyed, released or otherwise relinquished to it its equitable estate therein.

(2) *Deeds of Conveyance.*

By article fifth of the contract of January 2, 1882, the temporary trustees declared that the purchases made by them were made in their names upon the trusts set up in said instrument, and they agreed to quitclaim and convey the same to the permanent trustee, provided for by such instrument, upon demand and reimbursement. Their several deeds of conveyance of the properties so acquired by them were premised upon resolutions of the

respective proprietary companies and of the Des Moines Company, adopted for the purpose of vesting the terminal properties in the Des Moines Company as the permanent trustee thereof under the provisions of the contract of January 2, 1882.

(3) *The Mortgage of the Des Moines Company.*

It is stated that, since the Des Moines Company was required to make a mortgage upon the properties to which it took title to reimburse the temporary trustees for the cost of the purchases made by them, it must be presumed that the Des Moines Company took not only the legal but the beneficial interests in the properties conveyed to it. Such a statement ignores the principle that the attributes of a trust are to be limited alone by the intent of the parties setting up the same. Trustees may be given powers to sell and reinvest the proceeds of trust property, and to mortgage the same in the interests of the trust estate. The term "trustee" and the term "reimbursement" were used advisedly in the fifth article of the contract of January 2, 1882. It was the clear intent of the parties by their deliberate expression in that contract that a *"trustee"* should take title to the properties, that a *"trustee"* should mortgage these properties and issue its bonds and that a *"trustee"* by means of these bonds should *"reimburse"* the temporary trustees for the advances made on acount of the terminal properties. Thus, the making of the mortgage by the Des Moines Company, the issuing of the bonds thereunder and the delivery of the same to the temporary trustees of the terminal properties in exchange for the deeds of conveyance were a literal compliance with the provisions of the contract of January 2, 1882.

(4) *The Supplemental Agreement of May* 10, 1889. (Rec., 479.)

This agreement had its inception in a resolution adopted at a stockholders' meeting of the Des Moines Company on March 31, 1888. (Rec., 476.) It was resolved that the proprietary companies shall "pay the operating expenses, taxes and interest on bonds that are or may be issued, after deducting any amount received from other sources for rental, prorated on a wheelage basis, and that said payments, including interest charges shall be made monthly." It was further resolved "That Colonel W. H. Blodgett be requested to prepare an agreement for thirty years from May 1, 1888, based on the above resolution and covering in detail the conduct and operation of the Des Moines Union Railway Company. Said agreement to be approved and executed by all the lines now holding an interest in the property.

Said agreement shall provide that if, at the end of six months from the date of the same, either party to the contract shall feel that the terms of the same are unjust to them, and give notice to that effect, it shall be a matter for readjustment." (Rec., 478.)

And it was also resolved "that the terms and conditions on which the several lines now interested, or which may hereafter become interested, shall enjoy the use of these terminals, be fully set forth in a *supplemental agreement* to be made and executed between the Des Moines Union Railway Company and each of the lines using the said terminals." (Rec., 478.)

Of the necessities for this agreement, Col. Blodgett, who drew the same, said:

> "A. It was considered necessary to have something in addition to the agreement of January 2, 1882, for these reasons: In the first place the agreement

of January 2, 1882, made no provision for the payment of interest and did not provide how the interest charge should be distributed among the railroad companies using the property. That was one reason. Another reason was, that the contract of January 2, 1882, did not obligate the railroad companies who were parties to it or their assigns to use the terminal.

Q. Or pay interest?

A. Nor pay the interest. Let me see—there was the interest charge and the matter of using the property, and then the contract of January 2, 1882, put everything, all the expenses of maintenance and operation of all the property on a wheelage basis, and Mr. Hays and General Dodge and all the parties interested thought that the cost of operating the roundhouses should not be on a wheelage basis, but should be distributed among the railroad companies according to the number of engines that were housed and taken care of for each company; and those were the three things wherein, I think, the contract of May 10, 1889, differed from the contract of January 2, 1882.

Q. It was to cover those points?

A. It was for those reasons that all parties agreed it would be advisable to have a supplemental agreement." (Rec., 366-367.)

He also called attention to the fact that, in respect to the payment of the interest on the mortgage bonds of the Des Moines Company, the contract was to be made retroactive from May 1, 1888, and that the thirty-year period of its proposed existence was to be identical with the time in which the bonds of the Des Moines Company were to be outstanding. (Rec., 367.)

It is to be observed that at the date of this meeting of the stockholders of the Des Moines Company, a date *subsequent* to the conveyance of the terminal properties to the Des Moines Company, and to the execution of the Des Moines Company's mortgage, all of the parties distinctly recognize the continuing existence of the con-

tract of January 2, 1882, as it is elementary that a supplemental agreement presupposes the continuing force and vitality of the instrument upon which it is based.

From the above, it is also apparent that the agreement of May 10, 1889, was intended to be merely a regulation of the joint relations of the proprietary companies in the use of their common properties. This is evident not only because Col. Blodgett so states, but because the proprietary companies were resolving not separately but in the form of a resolution adopted by their corporate trustee that they should bear the operating expenses, taxes and interest charged upon their own properties, with the proviso that, if at the end of six months any one of them should regard the terms of the contract unjust, notice should be given to that effect and it should be a matter for readjustment; and that the agreement should be a "*supplemental agreement*," thus intending to keep in full force and effect the contract of January 2, 1882, and to supplement it with details necessary to make possible a harmonious joint user of the terminal properties by its three proprietors.

In objection to the above, it is stated that the preambles of the contract recite that the Des Moines Company became incorporated and organized under the laws of the State of Iowa, for the purpose of owning and operating a line of railway in the City of Des Moines, etc. (Rec., 363.)

Judge Hook, in his dissenting opinion answers the foregoing by saying that

> "in a preamble it was recited that, in pursuance of its charter, it acquired and owned a railway. The charter was that of 1884, into which the contract of 1882 was written." (Rec., 2121.)

An analysis of the terms of the contract also discloses

a recognition of the proprietorship of the second parties thereto in the terminal properties.

(a) No rental was required of the second parties; whereas, it provided for the payment of rental by other railroads who (without becoming stockholders) might be admitted to the use of the terminal properties with the unanimous consent of the second parties.

(b) The Des Moines Company was not intended to acquire revenue over and above its cost of operation, as amounts derived from other railroad companies were to be used to reduce the expense of operating the terminals assumed by the proprietary companies.

(c) The proprietary companies were to assume the control and operation of the Des Moines Company, through an executive committee of three, each of the three proprietors to have one representative. The executive committee was to appoint the superintendent of the properties and to make and enforce the rules and regulations for the use, management and operation of the terminals.

(b) Sections twenty-four and twenty-six identified the second parties to the agreement as proprietors of the properties, by providing the terms and conditions under which stock in representation of their proprietary interests was to be allotted to them, and in identifying the ownership of stock with the right of use and occupation.

(e) If an outsider should default in its obligations, the second parties were to reimburse the first party on a wheelage basis for the amount of such default, thus showing the responsibility of proprietors to protect their own interests.

The foregoing shows that the agreement of May 10, 1889, was made supplemental to the contract of January

2, 1882, for the purpose of settling the details of operation and accounting among the proprietors until May 1, 1918.

(5) *The issue of capital stock.*

The subject matter of the issue of capital stock has already been fully developed. The record shows that it was neither issued to reimburse the temporary trustees or their beneficiaries for advances made by them in acquiring the terminal properties, nor distributed in relation to such advances, but was issued in exact accord with the contract of January 2, 1882, and of the supplemental agreement of May 10, 1889, with the intent that it should represent the several aliquot estates of the proprietary companies in the common tenancy.

(6) *The Amended Articles of Incorporation.*

Full comment has been made upon this subject matter under title IV of this brief.

(7) *The agreement of July* 31, 1897. (Rec., 506.)

The sole object of this agreement was to make the Wabash Railroad Company, as successor to the St. Louis Company, and the Des Moines, Northern and Western Railway Company (the consolidated company) as successor to the Northwestern and Northern Companies, parties to the supplemental agreement of May 10, 1889. It is therein stated that so much of said contract "as relates to the *issuance and distribution* of the capital stock of said Des Moines Company is no longer binding and that the capital stock of said Des Moines Company is held as follows:" Thereafter, F. M. Hubbell & Son is listed, among others, as holding twenty-five hundred shares.

It is contended that this latter recital is a statement made by the Wabash Railroad Company inconsistent with the continuance of the trust established by the contract of January 2, 1882.

The above may be answered by saying that since it is an attribute of common tenancies that each title holder therein, irrespective of his proportionate interest, has a right of user of the common premises on a parity with all other tenants in common, the assignment by a proprietary company of an allotment of stock to an individual instead of to another railroad company is certainly not an act inconsistent with the continued existence of a proprietary interest in the terminal properties in such railroad assignor to the extent of any aliquot share of the same still held by it; and that the nature of the interest of an individual stockholder, assuming his rightful ownership of such stock in the terminal properties, is not on trial here.

Furthermore, the statement quoted from the above contract has a significance directly contrary to that contended for by the defendant. The sole object of the contract was to bring the consolidated company and the Wabash Company within the terms of the supplemental agreement of May 10, 1889. If stock in the Des Moines Company was not intended to represent proprietary shares in its properties, it would have been idle and irrelevant to recite in such contract its distribution and ownership. The purpose of this recital was undoubtedly to lock up, so to speak, the successor companies as tenants in common with the remaining tenants in common in said property in respect of their joint and several obligations. Finally it may be noticed that no allusion was made to the agreement of July 31, 1897, in the opinions of the court below except in the majority

opinion in connection with the disposition of the surplus earnings, where as affecting these earnings the majority opinion states:

> "A subsequent contract of July 31, 1897, does not affect this controversy." (Rec., 2114.)

VI.

TO GIVE THE ACTS AND CIRCUMSTANCES HEREINBEFORE ENUMERATED A CONSTRUCTION OR ASPECT IN DEROGATION OF THE EQUITABLE ESTATES IN COMMON OF THE PROPRIETARY COMPANIES, PURSUANT TO THE CHARACTERIZATION THEREOF, OF THE MAJORITY OPINION OF THE CIRCUIT COURT OF APPEALS, WOULD BE TO PERMIT TRUSTEES OR FIDUCIARIES, NOT ONLY TO REPUDIATE THE RIGHTS OF THEIR CESTUIS QUE TRUSTENTS, BUT TO ACQUIRE FOR THEMSELVES THE BENEFICIAL INTERESTS IN THE TRUST ESTATES.

The Circuit Court of Appeals in its majority opinion holds that a trust was created under the terms of the contract of January 2, 1882, that the beneficiaries thereunder or proprietary companies at all times intended the continuance of said trust, but that the same, through acts of inadvertence "apparently harmless," was destroyed, and that the Des Moines Company became an independent corporation holding the trust properties free from the terms of the trust and under the control of the Hubbells.

The principle announced in the title to this subdivision of the brief is to be applied to the conclusions of the Circuit Court of Appeals as above stated. It has application to the parties in interest in their relation to the terminal properties in several aspects, namely:

(1) To the Des Moines Company and to any officer, director or agent thereof, making a claim on its behalf or to his own advantage inconsistent with the rights or

interest of the proprietary companies as beneficiaries of the trust assumed by the Des Moines Company.

(2) To any cotenant in the common equitable estate, whether one of the proprietary companies or a successor in interest thereto by assignment of its estate as against the interest of any other cotenant in the common equitable estate.

At all times during the transactions involved in this litigation, F. M. Hubbell was an officer and director of the Des Moines Company and of each of the three proprietary companies and the controlling stockholder of the Northwestern Company and of its successor the consolidated company from which he acquired the five-eighths interest in the stock of the Des Moines Company, upon which he now bases his claim. (Rec., 1296.)

In the above respect he actively participated in the management of the corporate affairs of the Des Moines Company and of the Northwestern and the consolidated companies, and he was, moreover, the individual upon whom the Wabash Company and its successor, the purchasing committee, relied in confidence for the purpose of protecting their interest in the terminal properties at Des Moines.

Therefore, as an officer, director or agent of the Des Moines, he was bound by the terms of the trust and in this respect could not take advantage of any act of a proprietary company in derogation of its beneficial interest in the trust estate. A trustee is not permitted to assert in his own behalf any right or interest in trust properties resulting from the inadvertence of his beneficiaries. (Bigelow on Estoppel, 6th Edition, page 568.)

Likewise, as an officer, director and controlling stockholder of the consolidated company, a successor in interest to an aliquot estate in the properties acquired

to be held and used in common, he controlled the acts of a trustee and was thus bound as a fiduciary, for cotenants occupy to each other the position of express trustees in respect to the property held in common.

In the case of *Bissell* v. *Foss*, 114 U. S., 252, at page 259, it is said:

> "It is true that one of two or more tenants in common, holding by a common title, cannot purchase an outstanding title or incumbrance upon the joint estate for his own benefit. Such a purchase enures to the benefit of all, because there is an obligation between them, resulting from their joint claim and community of interest, that one of them shall not affect the claim to the prejudice of the others. *Rothwell* v. *Dewees*, 2 Black, 613; *Van Horne* v. *Fonda*, 5 Johns. Ch. 388; *Lloyd* v. *Lynch*, 28 Penn. St. 419; *Downer* v. *Smith*, 38 Vt. 464."

See, also, to the same effect the case of *Rothwell* v. *Dewees*, 2 Black, 613, at page 618, in which it is said:

> "In the case of *Van Horne* v. *Fonda*, 5 Johns. Chy. R., 407, the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase money."

See, also, *Turner* v. *Sawyer*, 150 U. S., 578, at page 586, and *Starkweather* v. *Jenner*, 216 U. S., 524, at page 538.

The principle announced in the above authorities, which makes one cotenant a trustee for another, where he buys an outstanding title of the common estate, would, of course, apply with peculiar force where one would attempt to acquire a control or title to the common estate as against the other by taking advantage of his unintentional acts in derogation of his title. If the foregoing be true, of course, it also follows that Hubbell, as a successor to the consolidated company in ownership to

a portion of the stock in the Des Moines Company, by a transaction in which he was virtually both seller and buyer, could have rights no greater than the consolidated company, his controlled vendor. Thus, whatever his status as an individual stockholder in respect of the terminal properties of the Des Moines Company, he may not assert thereby a control over the properties of the Des Moines Company inconsistent with the trust estates of the proprietary companies therein.

It is appropriate here to submit to this Court the form of relief which should be awarded the complainants in the enforcement of their proprietary interests in the terminal properties. The trust established by the contract of January 2, 1882, has never been abrogated. The period of the supplemental agreement of May 10, 1889, has expired. The rights of the proprietors should be protected upon the basis of the attributes belonging to their equitable estates established by the original trust instrument, and this Court is, therefore, asked to decree that the complainants are entitled to the use and occupation of the terminal properties in perpetuity, the cost of operation to be divided between them on a basis of wheelage, as provided in Article Sixth of the contract of January 2, 1882. (Rec., 413.)

VII.

THE FIVE-EIGHTHS STOCK INTEREST IN THE DES MOINES COMPANY HAVING BEEN ACQUIRED BY THE HUBBELLS FROM THE CONSOLIDATED COMPANY, OF WHICH THEY WERE DOMINATING STOCKHOLDERS AND DIRECTORS, IN VIOLATION OF THEIR FIDUCIARY OBLIGATIONS TO THE PROPRIETARY COMPANIES, THE DECREE HEREIN, IN ADDITION TO THE PRIMARY RELIEF ASKED QUIETING THE EQUITABLE TITLES OF THE COMPLAINANTS IN THE TRUST PROPERTIES, SHOULD ALSO PROVIDE FOR A RESCISSION OF THE STOCK TRANSACTION AND FOR A REDEMPTION OF THE SHARES BY THE COMPLAINANTS ON EQUITABLE TERMS.

Enough has already been said to demonstrate the clear right of the complainants to the primary relief asked in the amended complaint quieting their equitable title to the trust properties and protecting them in the use and enjoyment thereof upon the basis of the contract of January 2, 1882.

It is unthinkable that these great public carriers, serving a populous community by means of railway facilities, which they and their predecessors established in the exercise of corporate franchises derived from the State of Iowa, and in a large measure through the aid of grants and subsidies provided by the community itself, should be cut off from the use of these facilities as the result of machinations of their own fiduciary and trustee.

The granting of a decree enforcing alone the right of the complainants to the use and enjoyment as equitable tenants in common of the terminal properties, would, however, leave undetermined a subordinate but important question as to the proper disposition of the shares of the Des Moines Company claimed to be owned by F. M. Hubbell & Son.

It was never intended by the proprietary companies

or their predecessors that any of the shares of the Des Moines Company should be permanently divorced from the beneficial ownership, use and enjoyment of the terminal properties.

By the contract of January 2, 1882, as already pointed out, an undivided quarter interest in the terminals represented a proprietorship thereof, and a one-quarter interest was allotted each to the Northwestern Company and the Northern Company and a one-half interest to the St. Louis Company, leaving in the possession and control of the St. Louis Company a surplus quarter interest which might be sold to another railway company. It was then understood and agreed by the proprietary companies that this surplus quarter interest held by the St. Louis Company might be sold to another railway company desiring to use the terminals, but only sold to such railway company and "not to outsiders."

This agreement was recognized by F. M. Hubbell in his correspondence with Ashley in 1888. (Rec., 1060.) A year later it was definitely incorporated in the supplemental agreement of May 10, 1889, as Section twenty-four thereof. (Rec., 485.)

Afterwards, as testified by A. B. Cummins, the personal counsel of the Hubbell interests, and the general counsel of the Des Moines Company, the proprietary companies determined to broaden the trust enterprise so "that all the railroads in Des Moines could be brought into these terminals" and "that each railroad that might come into the depot in the future might become the owner of one-eighth of the stock." (Rec., 1208.)

This merely involved a redivision of the shares of the trust enterprise into eighths instead of quarters, each interest to be measured by one-eighth of the stock of the Des Moines Company—a division which, as a

glance at a railroad map will show, corresponds precisely to the number of railroads entering Des Moines.

At this juncture, F. M. Hubbell again approached Ashley respecting the purchase of the surplus interest held by the St. Louis Company and in the months of February and August, 1890, he induced Ashley to part with three-eighths of the stock of the Des Moines Company held by the St. Louis Company, upon the distinct understanding "that a one-eighth interest in the capital stock shall be sufficient to represent a *proprietorship* in the company." (Rec., 1602.)

That this transaction was in furtherance of the trust enterprise and not in destruction of it is clear.

That it was not intended that Hubbell individually should permanently hold the stock is equally clear.

In the hands of Hubbell, the stock of the Des Moines Company could have no legitimate value, except for the purpose of resale to other companies who could be admitted with the original proprietors as equitable tenants in common in the use and occupation of the terminals.

What effort, if any, was made by Hubbell to bring in new proprietors does not appear.

It does appear, however, that within a year after the above transaction, Hubbell and Dodge resold at a profit to themselves the three-eighths interest, acquired as above, to the consolidated company formed by the union of the Northwestern and Northern Companies, which it is to be noted was directly in line with the definite understanding of the various parties that shares in the Des Moines Company could only be held by railway companies using the terminals.

For the two-eighths interest sold by Hubbell, he received from the consolidated company its first mort-

gage bonds at par, in the amount of $60,000, which was at the rate of $30,000 for each one-eighth interest. (Rec., 1461.)

The shares remained in the treasury of the consolidated company for nearly two years when, together with certain other shares, they were removed therefrom by the Hubbells by successive transactions, to which the attention of this Court is especially directed.

At a meeting of the board of directors of the consolidated company, held October 4, 1893, on motion of A. B. Cummins, a director of that company, and the personal counsel of the Hubbell interests, it was resolved to pledge five-eighths of the stock of the Des Moines Company, out of the seven-eighths then held by the consolidated company, as security for certain alleged outstanding notes of that company held by F. M. Hubbell & Son. (Rec., 1480.)

Inasmuch as this pledge of the five-eighths interest in the Des Moines Company was given, or attempted to be given, on the threshhold of a receivership, as security for *antecedent* indebtedness of the consolidated company, the pledge was voluntary and without consideration and consequently was invalid. (Jones on Collateral Securities, Section 360a.)

The next step taken by the Hubbels was in the nature of a *pro forma* foreclosure of the invalid pledge.

At a meeting of the board of directors of the consolidated company held January 29, 1894, less than four months after the transaction above mentioned, on motion of A. B. Cummins, a resolution was adopted surrendering to F. M. Hubbell & Son, in satisfaction of a certain part of the consolidated company's alleged note indebtedness the five-eighths interest in the Des Moines

Company's stock at 10 per cent of its face value or at a rate of $5,000 for each one-eighth interest. (Rec., 1482.)

That F. M. Hubbell abstained from voting either for or against the resolution of the board of directors of the consolidated company is, we submit, of no consequence. He was the president of the company, and he and his firm owned and controlled a majority of its capital stock and he dictated and controlled the action of the directors in all respects. Of the seven members of the board of directors, three (F. M. Hubbell, F. C. Hubbell and H. D. Thompson) were members of Mr. Hubbell's immediate family and a fourth, A. B. Cummins, was the personal attorney for the Hubbell interests.

As F. M. Hubbell himself had valued a one-eighth interest at $30,000, in the sale made to the consolidated company two years earlier, giving to the five-eighths he took from the consolidated company under the resolution last above mentioned for $25,000 a valuation of $150,000, it is unnecessary to argue that the transaction in and of itself was a fraud on the consolidated company, its stockholders, bondholders and other creditors. Moreover, the alleged notes of the consolidated company, which the Hubbells surrendered at their *face* value, in payment for these shares in the Des Moines Company were unsecured, save as they themselves had sought to secure them by the invalid pledge made three months earlier: The property of the consolidated company, including an additional two-eighths interest in the Des Moines Company, was encumbered by a mortgage to the Metropolitan Trust Company of the City of New York, securing an issue of bonds upon which a default was imminent. The notes of the consolidated company, which the Hubbells so surrendered at their *face* value, were junior in equity to the outstanding mortgage bonds, and as to these the record states "that the company had

made strenuous efforts to dispose of the same at 55 per cent of their face value" but had been "wholly unable to do so." (Rec., 1482.)

The immediate purpose of the above transaction was to enable F. M. Hubbell to remove from the treasury of the consolidated company, of which he was the president, a director and the dominating stockholder, certain assets which were unpledged but held by the company in trust for its creditors to apply the same to the full payment of a certain uncollectible indebtedness held by his own firm; thus preferring his own firm over other creditors equally entitled to the benefit of the free assets of the company, including among these creditors the holders of bonds secured by the mortgage to the Metropolitan Trust Company and then unsalable in the market on the basis of 55 per cent of their face value.

The ultimate purpose of the transaction was to place in the possession, and under the dominion and control of F. M. Hubbell, shares of the Des Moines Company, of which he was also an officer and director, to be employed by him in furtherance of a scheme to destroy the proprietary interests of the consolidated company and the Wabash Company in the terminal properties held in trust by the Des Moines Company. At this time he was, it will be recalled, negotiating to sell his interest in the consolidated company to the St. Paul Company.

Against these transactions, the complainants are clearly entitled to equitable relief.

As stated at the outset, it was never intended that the stock of the Des Moines Company should be permanently divorced from the beneficial ownership, use and enjoyment of the terminal properties. Representing, as it unquestionably did, the several proprietary or aliquot interests in the trust properties, each of the proprietary

companies was an express trustee of the other as to the common property held in equitable title and was precluded from dealing with the trust properties or with any interest therein to the injury of one or more of the equitable cotenants. The disability of one equitable cotenant to thus deal with the trust properties is an incident of the reciprocal trusteeship existing between cotenants. (*Rothwell* v. *Dewees*, 2 Black, 613.)

The defendant Hubbell, as an officer, director and dominating stockholder of the consolidated company, had no right to take from its treasury on *any* terms an interest in the Des Moines Company to be employed in his hands to lessen or impair or undermine the interests which that company retained in the Des Moines Company and had pledged to the Metropolitan Trust Company.

The consolidated company had no right to give to anyone, much less to F. M. Hubbell & Son, an interest in the Des Moines Company to be employed in the hands of the taker to lessen or impair or undermine the interests in the Des Moines Company held by the St. Louis Company.

Moreover, in the present instance, each of the equitable cotenants had agreed with the others and with the Des Moines Company that no share in the Des Moines Company could be transferred without the consent of all of the proprietors, and it was further agreed that all stock certificates of the Des Moines Company "shall express upon their face that they are not transferable in whole or in part, without the consent in writing" of the proprietary companies. (Rec., 487.)

That F. M. Hubbell, as secretary of the Des Moines Company, issued the stock certificates of the Des Moines Company, without placing thereon this legend is not disputed.

That F. M. Hubbell never obtained from the St. Louis Company or from the Metropolitan Trust Company, as mortgagee of the consolidated company, a written consent or any other consent to the transfer of the five-eighths interest here in question is also not disputed.

Upon these facts the complainants have a clear remedy.

The original pledge of the five-eighths interest to F. M. Hubbell & Son, having been made without notice either to the St. Louis Company or to the Metropolitan Trust Company, as mortgagee of the consolidated company, and the pledge having been foreclosed without public sale or judicial sale, but under a fraudulent private sale had under action of the board of directors of the consolidated company dominated by Hubbell, a sale made without notice either to the St. Louis Company or to the Metropolitan Trust Company, it follows (viewing the transaction most favorably from the standpoint of the Hubbells), that the shares passed to the Hubbells and have been continuously held by them, subject to redemption on equitable terms by the St. Louis Company and the Metropolitan Trust Company or those claiming under it.

Nor is the right of the complainants to equitable relief barred by laches. The fraud was not discovered until after the institution of this suit, and it is elementary that laches does not operate until the fraud is discovered.

As the proprietary companies and their successors held equitable estates in the terminal property as tenants in common, it was immaterial in respect of their rights of use and occupation of the same which company held the major portion of the Des Moines Company's stock. The Hubbells having diverted and obtained possession of 2,500 shares of the Des Moines Company's stock in violation of their trust obligations, the right to redeem the same belongs jointly and severally to the complainants

in their status as tenants in common. Therefore, they ask that said 2,500 shares so diverted and held by the Hubbells be surrendered to the complainants upon reimbursement to the Hubbells for the amount claimed to have been paid by them for such shares, to wit: $25,000, with interest thereon from January 29, 1894.

It will be recalled in this connection that the unanimous vote of the stockholders of the Des Moines Company is necessary to elect a director and that the unanimous vote of the eight directors of the company is necessary for the election of officers. The Hubbells controlled the board of the company and held its principal offices at the time of the institution of this suit and the complainants are unable to dislodge them. They are usurping the several offices they hold in plain violation of the community principle upon which the Des Moines Company was organized and have arrogated to themselves, as individuals, the management of the vast property interests held in trust by the Des Moines Company. As the corporate representative and agency of the proprietary companies, the Des Moines Company has ceased to function and, unless equitable relief in this respect is awarded to the complainants, a dissolution of the Des Moines Company is the only alternative to perpetual domination and control of its affairs by these thoroughly discredited defendants, who assert their control by the suffrage of shares of stock held under a title which is fraudulent *per se* and is voidable by the complainants upon settled principles of equity. In such a situation, affecting as it does not only the rights of these complainants as public carriers but also the vital interests of the City of Des Moines, an application of the well settled principles of equity above developed seems eminently proper and just.

VIII.

NO FACTS APPEAR IN THE RECORD CONSTITUTING AN ESTOPPEL OR LACHES DEFEATING THE EQUITY OF THE COMPLAINANTS.

That the doctrine of estoppel has no application in this controversy, except as it may operate against the Hubbells, is too clear for argument.

It is fundamental that no man can set up another's act or declaration as a ground of an estoppel, unless he, himself, has been misled or deceived thereby.

Further, as stated by Mr. Justice Field, speaking for this Court in *Brant* v. *Virginia Coal & Iron Company et al.*, 93 U. S., 326, at page 337:

> "It is also essential for its application with respect to the title of real property that the party claiming to have been influenced by the conduct or declarations of another to his injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel."

As F. M. Hubbell was an officer and director in the Des Moines Company and had for years been directing the trust enterprise, his actual knowledge of the condition of the title was certainly as good, in fact far superior to that of the proprietary companies and their representatives. Manifestly, he can claim no estoppel against them.

He, however, by reason of his official relation to the trust enterprise was the principal, if not the only, channel of information available to them in respect thereof. They were entitled to rely implicitly upon any statement

which he might make with reference thereto, and he is estopped to repudiate any such statement.

Take, for example, his dealings with Ashley in 1890 when he acquired the three-eighths interest in the Des Moines Company's stock:

He induced Ashley to part with the stock in question upon the distinct understanding that a one-eighth stock interest "shall be sufficient to represent a proprietorship in the company." He now seeks to repudiate this understanding, but is estopped to do so because, if a one-eighth interest was *not* sufficient to represent a proprietorship,

(a) Hubbell so represented the fact to Ashley;

(b) The circumstances were such that knowledge of the truth was imputed to Hubbell; and

(c) Hubbell thereby induced Ashley to change his position.

There are here present all of the elements of a complete estoppel:

Bigelow on Estoppel, 476.

Herman on Estoppel, 797.

The Hubbells insist, however, that at various times, especially during the period between 1897 and the date of the institution of this suit, the complainants had dealings or negotiations with the Hubbells for an extension of the supplemental agreement of May 10, 1889, and that by reason of these negotiations:

(a) They had induced the Hubbells to believe that the stock in the Des Moines Company represented valuable property rights;

(b) That they had led the Hubbells to believe that they recognized them as the lawful owners of the five-eighths interest in the stock of the Des Moines Company, and

(c) That in reliance upon these representations of the complainants they served with-

out direct compensation as officers and directors of the Des Moines Company for a long period of years solely for the purpose of building up the terminals and making the terminals valuable so as to enhance the value of their stock interest in the Des Moines Company.

We shall refer briefly to these propositions in their order, as stated.

The record discloses no representation on the part of the complainants, or either of them, respecting the property rights represented by the Des Moines Company stock apart from the definite agreement and understanding between F. M. Hubbell and Ashley already mentioned, namely, that a one-eighth stock interest in the Des Moines Company should be sufficient to represent a proprietorship in that company. How valuable such proprietorship may be the complainants do not know and have never stated. They do, however, regard it as an immensely valuable interest and have always so regarded it; and inasmuch as the five-eighths stock interest claimed to be owned by the Hubbells is equivalent to five proprietary interests in the Des Moines Company, it follows that the stock interests claimed to be owned by the Hubbells are very valuable. If their title to this five-eighths interest were good, they could readily dispose of the same to various railway companies whose lines enter the City of Des Moines, a number of which are already using the terminals and paying substantial rentals therefor.

The title under which the Hubbells claim to hold this stock has already been discussed.

Neither of the complainants had any knowledge of the purpose for which this stock had been acquired until Hubbell declared it in 1905, and they had no knowledge as to the character of the Hubbells' title thereto until the

Hubbells themselves introduced in evidence in this suit the records of the consolidated company, to which the attention of this Court has already been directed.

Afterwards the complainants amended the bill so as to obtain a decree setting the transactions aside.

The first definite advice to the Wabash Company of Hubbell's claim to own this stock interest came to it as follows:

Ashley, on behalf of the Wabash purchasing committee, was negotiating to sell certain of the Des Moines Company's bonds when the point was raised that by reason of foreclosure proceedings and reorganizations of the Northwestern and Northern Companies, parties to the supplemental agreement of May 10, 1889, these companies had ceased to exist, and that the reorganized consolidated company, their successor, was under no definite contract obligation to use the terminals and pay its proportion of the interest on the Des Moines Company's bonds. (Rec., 1561.) Ashley at once wrote Hubbell asking that he arrange for the execution of a new agreement with the reorganized consolidated company as a party, the agreement

> "to be exactly as before, except that the time must be made to correspond with the life of the bonds, or to be made for a period to extend beyond their maturity." (Rec., 1673.)

Upon receipt of this letter Hubbell wrote Cummins directing that he prepare a new agreement and suggesting certain changes, the significance of which, in the light of subsequent developments, cannot possibly be misunderstood.

We call especial attention to the following suggestions made in his letter to Cummins. He says:

> "On page one of the present contract, the extent of the present railway seems to be limited to the

east boundary line of the city on the east and to Farnham street on the west. I suggest that there be no limit either east or west."

The purpose of this we will indicate later.

He further says:

"I think it advisable to have the new contract recognize the ownership of the stock as it now exists, hence the last seven lines of Sec. 24 are unnecessary, as the Wabash Company and the D. M. N. & W. Company, each being bound to always have a director in the D. M. Union Company, can decide whether or not new railroad companies shall be admitted." (Rec., 1674-1675.)

Following the directions contained in the above letter Cummins prepared a new agreement which Hubbell mailed to Col. Blodgett with a letter from which we quote the following:

"Mr. Ashley wanted it sent to you for approval. As soon as it is approved, if you will return it to me I will have it printed in the form of a pamphlet and we will execute it in that form instead of the long sheet written in type.

If you have occasion to amend this contract, please do so as quickly as you can and return it to me and if the amendments are agreed to, we will proceed to print, say one hundred copies, four of which we will execute as originals, one for each party to the contract.

Mr. Ashley is in a great hurry for this contract and I therefore ask you to be as expeditious as possible." (Rec., 1679.)

The draft of contract so prepared by Cummins under Hubbell's directions, and forwarded by Hubbell to Col. Blodgett, contained the following provision relative to the Des Moines Company's stock:

"It is stipulated and agreed * * * that the capital stock of the said Des Moines Union Railway Company is now *rightfully* held as follows, to wit: Purchasing committee of the Wabash,

St. Louis & Pacific Railway Company	500 shares
Des Moines and North Western Company	1,000 shares
F. M. Hubbell & Son	2,500 shares

In spite of Hubbell's obvious anxiety to have the agreement approved and executed without revision, Col. Blodgett withheld his approval. A protracted negotiation ensued, but the parties failed to agree on a new instrument to be substituted for the supplemental agreement of May 10, 1889.

To analyze the correspondence and other data relative to this negotiation would be impracticable.

It is sufficient to say that a careful examination of this evidence will fail to disclose a single fact or representation on the part of the complainants, or their predecessors, which was inconsistent with the continued existence of the trust established by the contract of January 2, 1882.

Failing to agree upon a new agreement to substitute for the supplemental agreement of May 10, 1889, the parties, in order to cover the point originally raised by Mr. Ashley, executed the instrument known and heretofore referred to as the agreement of ratification and confirmation of July 31, 1897. This instrument contains the following provision:

> "That so much of said contract, a copy of which is hereto attached (contract of May 10, 1889) as relates to the issuance and distribution of the capital stock of the said Des Moines Company is no longer binding and that the capital stock of the Des Moines Company is held as follows:
> 500 by the purchasing committee of the Wabash Company, 1,000 by the Des Moines and Northwestern Railway Company and 2,500 by F. M. Hubbell & Son." (Rec., 506.)

This was certainly not an admission on the part of the complainants or their predecessors that the 2,500 shares

referred to were *rightfully* held by the Hubbells, the word "rightfully" inserted in the original draft of agreement submitted by Hubbell having been stricken out by Col. Blodgett. It was merely a recital of the fact not now disputed that the Hubbells then *held* the stock, and the recital was made under circumstances that did not put the Wabash Company upon inquiry as to the validity of their title.

At the time this so-called agreement of ratification was signed, the Wabash Company had no knowledge or no means of knowledge of the transaction under which the Hubbells acquired possession of this five-eighths stock interest in the Des Moines Company, and they had no knowledge or means of knowledge of the fraudulent purpose for which it was acquired until October, 1905. Moreover, at the time the agreement was executed the consolidated company was still under the domination and control of the Hubbells and could not effectively ratify a fraudulent transaction of which the Hubbells were beneficiaries.

The record further shows that after the St. Paul Company had succeeded to the rights of the consolidated company there were further negotiations with Mr. Miller, on the part of the St. Paul Company, and Mr. Ramsay, on the part of the Wabash Company, for an extension of the supplemental agreement of May 10, 1889.

Mr. Ramsay, called as a witness by the Hubbells, testified that he entered into these negotiations without having considered whether the Wabash Company had any right to use the terminals independent of the contract of 1889. Answering the question whether he had heard either of the Hubbells at any time set up a claim that the Wabash Company would not have the right to use that property after the expiration of the contract of 1889, he testified:

"I never heard any such claim set up." (Rec., 1264.)

Moreover, as we have already pointed out, both Mr. Miller and Mr. Ramsay and the other operating officials of the St. Paul and Wabash companies were dependent upon the Hubbells themselves for information respecting the terminal situation.

That the Hubbells, thus situated, cannot claim an effective estoppel by reason of any act or representation of the officials of the St. Paul and Wabash companies, is clear.

If, however, authority is necessary on this point, the case of *Chicago, Milwaukee and St. Paul Railway Company* v. *Des Moines Union Railway Company et al.*, 165 Iowa, 35, will serve the purpose.

This case grows out of another transaction of the Hubbells in connection with the terminal properties at Des Moines.

The salient features may be briefly stated:

At the time the Hubbells took from the treasury of the consolidated company the five-eighths stock interest in the Des Moines Company, which they now claim to own, they were negotiating to sell their holdings in the consolidated company to the St. Paul Company.

The terminus of the line of the consolidated company was at Farnam street, afterwards 16th street, where it connected with the tracks of the Des Moines Company at the latter's westerly yard limit.

This terminus was so fixed both by the contract of January 2, 1882, and the agreement supplemental thereto of May 10, 1889.

As soon as the negotiations with the St. Paul Company had taken the definite form of a contract, the Hub-

bells moved out the yard limit sign to 28th street so as to include in the terminal properties of the Des Moines Company, and exclude from the properties of the consolidated company, one mile of railway between 28th street and 16th street belonging to the consolidated company.

It was in furtherance of this fraud that Hubbell in his letter to Cummins of December 31, 1896, wrote:

> "On page one of the present contract, the extent of the present railway seems to be limited to the east boundary line of the city on the east and to Farnam street on the west. I suggest that there be no limit either east or west." (Rec., 1674.)

Early in 1898, in anticipation of the transfer of their interest in the consolidated company to the St. Paul Company, the Hubbells caused the Des Moines Company to assume possession and maintenance of this mile of railway, and when the consolidated company was transferred to the St. Paul Company the Hubbells represented to the latter that the line of the consolidated company terminated at 28th street.

From that time on until 1907 the Des Moines Company retained possession of and asserted control and ownership of the one mile of railway between 16th street and 28th street.

The true situation was not discovered until 1907 when the St. Paul Company promptly instituted suit to recover the property. The Hubbells resisted the suit and urged there, as they urge here, the plea of estoppel and acquiescence. In rejecting the plea, the Supreme Court of Iowa said:

> "The evidence to sustain the plea of estoppel tended to show that, with knowledge of plaintiff (St. Paul Company) and its grantor (the reorganized Consolidated Company) defendant (the Des Moines Company) expended large sums of money in grad-

ing, laying sidetracks, and maintaining the road. These expenses, however, were incurred with knowledge on the part of the officers of the defendants (F. M. Hubbell and F. C. Hubbell) that it did not own the road and that it was in reality the property of plaintiff or its grantor, and, this being so, it could not have been misled to its prejudice by the acquiescence of plaintiff in what was being done, to say nothing of plaintiff's ignorance concerning its title and that of its grantor. That there can be no estoppel under these circumstances is too elementary to require citation of authority."

With this recent expression of the Supreme Court of Iowa, upon an identical state of facts, we might well conclude the discussion.

The Hubbells claim, however, that they have devoted the better part of their lives to the building up of these terminals without compensation and without hope of compensation except such as might flow from the increased value of their stock.

Even if this were true it would not help them for the reason pointed out by the Supreme Court of Iowa.

It is, however, not true.

The record shows that the Hubbells devoted their time and energy to the trust enterprise for a period of fifteen years prior to the time when they acquired stock in the Des Moines Company. They were working then without compensation and were certainly working without hope or expectation of a reward flowing from the increased value of their stock, since they held no stock. The truth is that the management of the terminal enterprise was merely incidental to the real estate operations conducted for many years by the Hubbells under the firm name of F. M. Hubbell & Son. A dominant position in the management of the Des Moines Company gave them a grip upon the development of a great and

growing city; and it was their control and manipulation of the terminal enterprise which enabled them to conduct their real estate operations successfully and profitably, a fact admitted with obvious reluctance by F. C. Hubbell, under cross-examination. (Rec., 1199.) That their real estate operations were successful is not disputed, the vast extent of their holdings of real estate in the City of Des Moines being plainly indicated by the deed to the "Trustees of Hubbell Estate," executed December 31, 1903. (Rec., 681.)

In concluding this subdivision, and also in concluding the argument in number 278, we submit the following propositions, which have a direct materiality to every phase of this controversy:

Estoppel, acquiescence, ratification, laches and kindred equitable defenses, which have been developed by chancellors in furtherance of substantial justice, can never rest securely upon an equivocal state of facts. As stated in Bigelow on Estoppel, 6th Ed., page 641: *"Certainty* is essential to all estoppels." This is especially true of estoppel by laches. The law does not require a party to come into court to assert his rights until his rights have been clearly, directly and indubitably assailed. This rule is peculiarly applicable to the case of a trust. As pointed out by Mr. Justice Gray, speaking for this Court in *Speidel* v. *Henrici*, 120 U. S., 377, 386, time does not begin to run against a trust until

> "it is openly disavowed by the trustee, insisting upon an adverse right and interest which is *clearly* and *unequivocally* made known to the *cestui que trust;* as when for instance such transactions take place between the trustee and the *cestui que trust,* as would in case of tenants in common amount to an ouster of one of them by the other."

The complainants have been in undisputed use and enjoyment of the terminal properties continuously since

the establishment of the trust in 1882—originally under the contract of January 2, 1882, *alone*, and subsequently under this contract as supplemented by the agreement of May 10, 1889. At no time did the Des Moines Company by any *clear* and *unequivocal* action (even at the illegal stockholders' meeting of April 8, 1890), repudiate the trust or indicate any purpose to repudiate it. Nor did either of the Hubbells ever repudiate or question the trust until October, 1905, and promptly thereafter the complainants commenced this suit.

IX.

THE SO-CALLED SURPLUS EARNINGS WERE PROPERLY AWARDED TO COMPLAINANTS BY THE UNANIMOUS DECISION OF THE CIRCUIT COURT OF APPEALS.

The controversy as to the so-called "surplus earnings" presented in No. 279 will only become material in the event that this Court decides that the complainants have no proprietary interest in the Des Moines Company.

The Circuit Court of Appeals—all judges concurring—held that the revenues received by the Des Moines Company, and referred to as surplus earnings, belonged to the St. Paul and Wabash Companies. The majority opinion based such conclusion upon its interpretation of the supplemental agreement of May 10, 1889, taken as a whole, and the construction placed upon it by the acts of the parties thereto for a series of years following its execution. Judge Hook based his conclusion in the above respect not only upon the grounds above stated, but also upon the broader ground that the increments of the trust properties belonged to the proprietors under the terms of the trust.

Since the opinion of the Circuit Court of Appeals on this branch of the case was unanimous, and since the is-

sue thus disposed of involves no public interest and no rule or principle of law, which public interest requires this Court to determine, it may be that this court will conclude to dismiss as improvidently granted the *writ of certiorari* in No. 279, issued upon the petition of the Hubbells. *Furness Withy & Co., Ltd.*, v. *Yang-Tsze Insurance Association, Ltd. et al.*, 242 U. S., 430.

In the contingency, however, of this Court reaching a consideration of the question presented in No. 279, we submit the following brief remarks supplementary to the statement as to this controversy embodied in our preliminary statement of facts:

At the time of the filing of the bill of complaint in this suit, the so-called surplus earnings amounted to approximately $500,000. (Rec., 109-194.)

Although the record does not show the amount of these accumulations at the present time, the testimony having been taken a number of years ago, it seems proper to state to the Court that these accumulations now amount to approximately two million dollars, or a sum equivalent to approximately 300 per cent of the Des Moines Company's outstanding capital stock.

As explanatory of the large amount of these accumulations, it should be noted that they are in no sense surplus earnings, but are the *gross* receipts of the Des Moines Company for switching, demurrage on cars of the proprietary companies and excess baggage carried by them; and also for rental of parts of its property, principally unused space in the Union Passenger Station and privileges in connection therewith; all of the expenses incident to the production of these earnings being borne by the proprietary companies.

The proprietary companies paid the interest charge on all the capital invested in the terminal enterprise; they

paid the taxes on the Union Station, the cost of heating it and lighting it and operating it; they paid the cost of operating the engine houses and the cost of turning, housing and maintaining the engines, the cost of furnishing water and fire, cost of firing and fueling the engines; in short, all of the operating expenses incident to the creation of the revenues denominated by the Hubbells as surplus earnings were borne by the proprietary companies. (Rec., 320-323.) It was, of course, the intention of the parties that all revenues of the Des Moines Company should be applied in the reduction of operating expenses charged to the proprietary companies, and the agreement of May 10, 1889, was authorized and drawn on this theory. Furthermore the resolution authorizing it provided that if at the end of six months any party thereto should feel that the terms were in any respect unjust and should give notice to that effect, the subject should be one for readjustment.

In the agreement itself it was provided (in Article twenty-eight) that if any question arose respecting any matter *not* provided for in the agreement, the same should be adjusted by arbitration, the arbitrators to "determine what would be just and equitable for each of said parties to do in and about the matter in dispute."

It seems that as early as December, 1889, the question arose as to whether or not these particular revenues should be credited to the proprietary companies under Section four of the agreement, and as soon as receipts of this character arose, the accounting officers of the Des Moines Company, by direction of its executive committee and its president, credited the amount of such receipts upon the monthly bills against the proprietary companies. This was done for a period of nearly two years. (Rec., 272-313.)

Thereupon, as shown in the statement of facts, the board of directors of the Des Moines Company, at a meeting held February 11, 1891, adopted a resolution ordering:

> "That the rents collected for the use of the Company's real estate and the switching charges paid in be credited on the bills of the different tenant companies occupying this Company's terminals, giving to each Company its share ascertained by wheelage." (Rec., 497.)

A year later the board ordered a temporary suspension of the practice pending the accumulation of a small fund for working capital, but distinctly recognized the right of the proprietary companies to receive these revenues. (Rec., 499, 338.)

Thus, the conclusion reached by the Court of Appeals, relating to the disposition of excess earnings, is in exact accord with the interpretation placed upon the provisions of the supplemental agreement of May 10, 1889, by the parties themselves, as disclosed by their acts in the disposition of these earnings, until the Hubbells, in the interest of their claim of corporate control, determined to repudiate this interpretation.

Of course, if the Des Moines Company had undertaken to withhold these revenues from the proprietary companies, they would have at once demanded a readjustment of the matter as being manifestly unjust to them or would have asked that the matter be determined by arbitration under Section twenty-eight on just and equitable principles, and inasmuch as the proprietary companies were paying all the expenses incident to the production of these earnings, their right to receive them could not have been questioned.

The Board itself, therefore, undertook to adjust the matter, and we submit adjusted it properly upon either

one or the other of the following interpretations of its acts.

If it be contended that under a literal construction of Section four of the supplemental agreement of May 10, 1889, it is doubtful whether the same be broad enough to include these accumulations, this doubt was resolved against the Des Moines Company by reason of the practical construction given to this section by the Des Moines Company's board of directors. *Topliff* v. *Topliff*, 122 U. S., 121, 131.

If, however, it be assumed that these revenues are not covered and disposed of by Section four, then it follows that no definite disposition thereof was made by the supplemental agreement, and the matter was open for adjustment "upon just and equitable" principles by a board of arbitrators under Section twenty-eight. In this situation the board of directors of the Des Moines Company, acting as such arbitrators, deliberately adjusted the matter in the only way it could be disposed of without doing violence to every principle of justice and equity. *Central Trust Company of New York* v. *Wabash, St. Louis and Pacific Railway Company*, 34 Fed. Rep., 254.

It is submitted, therefore, that the decision of the Circuit Court of Appeals in No. 279 should be affirmed or that the *writ of certiorari* issued therein should be dismissed.

In Conclusion.

The complainants ask the following relief:

In Case No. 278. (a) That the Court determine that the Des Moines Company took title to all properties vested in it subject to the terms of the contract of January 2, 1882, and holds them in trust for the complainants

herein subject to their joint use and occupation in perpetuity, as provided in said contract. (b) That the defendants F. M. Hubbell, F. C. Hubbell and the firm of F. M. Hubbell & Son be directed to surrender and deliver to the complainants 2,500 shares of the capital stock of the Des Moines Company upon payment to them of the sum of $25,000, with interest thereon from January 29, 1894, or in the alternative that said F. M. Hubbell, F. C. Hubbell and F. M. Hubbell and Son, and each of them, be perpetually restrained, by the order and injunction of this court, from selling, pledging or otherwise disposing of said shares of capital stock of the Des Moines Company, issued in their names, and that as holders of stock certificates, representing the same they and each of them be restrained by the order and injunction of this court from exercising any control or management of the terminal properties, excepting such as shall be in accordance with the terms and spirit of the contract of January 2, 1882.

In Case No. 279. That the decree of the Circuit Court of Appeals be affirmed or, in the alternative, that the writ of certiorari issued therein be dismissed.

All of which is respectfully submitted.

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